No. 3764

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

J. L. NIDAY, and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL, and A. L. GREEN,

Appellants,

vs.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

Transcript of the Record

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CLERK

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

CAPITAL NEWS PUBLISHING CO., BOISE.

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vs.

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Appellee and Cross Appellant.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

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Boise, Idaho.
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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

No. 759.

BILL OF COMPLAINT IN EQUITY.

JULIA GREEN GRAEF,

Plaintiff.

vs.

J. L. NIDAY, and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL, and A. L. GREEN,

Defendants.

COMES NOW the plaintiff above named, and for cause of suit against the defendants above named complains and alleges as follows:

I.

That during all the times mentioned in this bill of complaint the plaintiff was and still is a citizen, resident and inhabitant of the State of Oregon, residing in the City of Portland, Multnomah County, State of Oregon.

II.

That during all the times mentioned in this bill of complaint the defendants above named, and each of them, were and now are citizens, residents and

inhabitants of the State of Idaho, and the defendants, J. L. Niday and Mollie Green Niday, his wife, reside in the City of Boise in said State of Idaho.

III.

That during all the times mentioned in this bill of complaint the defendants J. L. Niday and Mollie Green Niday were and still are husband and wife.

IV.

That during all the times mentioned in this bill of complaint the defendants George A. Buell and Effie Ada Buell were and still are husband and wife.

V.

That on the 16th day of March, 1917, one R. E. Green died in the City of Boise, State of Idaho, leaving as his lineal descendants Julia Green Graef, the plaintiff above named, Gracia Green Acuff, and Mollie Green Niday, being the only daughters of said R. E. Green, and Philo F. Green, George L. Green and J. M. Green, being the only sons of said R. E. Green, who was eighty-one years of age at the time of his death.

VI.

That the said Julia Green Graef, Gratia Green Acuff, Mollie Green Niday, Philo F. Green, George L. Green and J. M. Green are the sole heirs at law of said R. E. Green, deceased.

VII.

That during the latter part of his lifetime the said R. E. Green resided in Canyon County, State

of Idaho, and for a few years prior to his death was the owner of and in possession of a large amount of real property situated in said Canyon County, State of Idaho, and more particularly the real property hereinafter described and commonly known as "Greenhurst," which was the home and place of residence of the said R. E. Green and his family.

VIII.

That on and prior to the 22nd day of December, 1914, the said R. E. Green was the owner and in possession of the following described property:

(a) That part of the northeast quarter of the northwest quarter of Section 6, Township 2 North, Range 1 W. B. M. lying north and east of the right of way of the Oregon Short Line Railway Company, containing 6 acres of land, more or less, situated in Canyon County, State of Idaho;
Together with ditches and ditch rights and a water right consisting of 4 miners' inches of the waters of what is commonly called "The Ridenbaugh Canal" owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof;

and on and prior to the 1st day of October, 1915, the said R. E. Green was the owner and in possession of the following described property:

(b) The southeast quarter of the northwest quarter and Lots 2 and 3, and all that part of Lot 4 lying north and east of the right of way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except 3 acres heretofore deeded to the Nampa and Meridian Irrigation District, all in Section

31, Township 3 North, Range 1 W. B. M., containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in anywise appertaining; being all situated in the County of Canyon and State of Idaho.

IX.

That on and immediately prior to the 1st day of October, 1915, that portion of the above described real property located on said Section 31 was worth, and of the reasonable value, of $30,000.00, subject to the lien of two mortgages—one in the sum of $10,000.00, and the other in the sum of $1,683.85; the first mortgage being recorded in Book 48, page 81 and the second in Book 59, page 89 of the mortgage records of Canyon County, Idaho.

X.

That the defendant J. L. Niday was during all the times mentioned in this bill of complaint the son-in-law of the said R. E. Green, and was an attorney-at-law, duly licensed to practice in the State of Idaho.

XI.

That for some time prior to the 22nd day of December, 1914, the said J. L. Niday, son-in-law of the said R. E. Green, acted as the attorney, counsellor, legal advisor and confidential adviser of the said R. E. Green, and such confidential relation continued continuously up until the time of the death of said R. E. Green.

XII.

That the said R. E. Green died intestate, and his personal property has been administered upon, and nothing remained of value for the plaintiff or his other heirs, except the defendant Mollie Green Niday.

XIII.

That the said R. E. Green was a man of industrious habits and strong character, and was of a congenial and amiable temperament, having strong domestic attachments, and was especially fond of his wife and children; that his attachment for his wife was of an exceptionally strong nature, and his wife was a woman of great activity and sound business judgment, and she greatly aided the said R. E. Green in the management of his affairs.

XIV.

That in the month of September, 1909, the wife of the said R. E. Green, while in a state of good health, was accidentally injured, and died within five days from the effects of such injury, and the sudden death of his wife greatly shocked and injured the said R. E. Green, causing his nerves and mental faculties to weaken, which condition continued until the time of his death, and became greatly aggravated during the latter part of the year 1914 and the years 1915 and 1916.

XV.

That the weak mental condition of the said R. E. Green made him extremely susceptible to the in-

fluences and suggestions of those who were in close and confidential relations with him, and made him especially susceptible to the influence and suggestions of the said J. L. Niday, who was his son-in-law, legal advisor and confidential advisor, and to the influence and suggestions of his daughter Mollie Green Niday, the wife of the said J. L. Niday, and for a considerable period of time prior to the 22nd day of December, 1914, the said R. E. Green was in such a mental condition that his mind was not a safe guide for his actions, and such condition was continuous and became gradually worse until the time of his death.

XVI.

That the defendants J. L. Niday and Mollie Green Niday, his wife, well knew the mental condition of the said R. E. Green during the years 1914, 1915 and 1916, and entered into a conspiracy to cheat and defraud the said R. E. Green out of his property, and to cheat and defraud the heirs of the said R. E. Green out of their legal interests in his property, and in furtherance of such conspiracy did in November, 1914, take over the management of the affairs of the said R. E. Green, knowing that he was incapable at that time of managing his own affairs, and caused the said R. E. Green to be removed against his wishes from Nampa, Idaho, to a house in Boise, Idaho, belong-

ing to the said J. L. Niday, and further caused the said R. E. Green to remain in said house until the time of his death.

XVII.

That further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property, the said J. L. Niday and Mollie Green Niday, his wife, acting secretly and clandestinely, caused the said R. E. Green to execute and deliver to the said J. L. Niday, his son-in-law and legal advisor, a warranty deed to the real property designated as "a" and described on page 3 of this bill of complaint, which deed was dated December 22nd, 1914, about one month after the said J. L. Niday and Mollie Green Niday, his wife, had caused the said R. E. Green to be brought against his will to Boise, Idaho, and placed in the house of the said J. L. Niday, which deed was not placed on the public record until February 19th, 1916, and the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known to this plaintiff, or to any of the lineal descendants of the said R. E. Green, except possibly to the defendant Mollie Green Niday, for the reason that none of said lineal descendants knew of the execution and delivery of said deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

XVIII.

That further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property, the said J. L. Niday and Mollie Green Niday, his wife, acting secretly and clandestinely, caused the said R. E. Green to execute and deliver to the said J. L. Niday, his son-in-law and legal advisor, a warranty deed to the real property designated as "b" and described on page 3 of this complaint, which deed was dated October 1st, 1915, about one year after the said J. L. Niday and Mollie Green Niday, his wife, had caused the said R. E. Green to be brought to Boise, Idaho, against his will and placed in the house of the said J. L. Niday, which deed was not placed on the public record until May 27th, 1916, and the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known to this plaintiff, or to any of the lineal descendants of the said R. E. Green, except possibly the defendant Mollie Green Niday, for the reason that none of said lineal descendants knew of the execution and delivery of said deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

XIX.

That at the time when each of said deeds was procured from the said R. E. Green, the said R. E. Green was in such a condition, mentally and physically, that his mind was not a safe guide for his actions, and he was not capable of transacting bus-

iness, and was directly subject to the influence and suggestions of his legal and confidential advisor, the said J. L. Niday, and his wife, and plaintiff alleges that said deeds were procured by the said J. L. Niday through the exercise of undue influence over the weakened mind of the said R. E. Green, and such fraud was not known to plaintiff until more than a year after the death of the said R. E. Green.

XX.

That at the time of the execution and delivery of each of said deeds, the real property covered thereby was of the actual and reasonable value of more than Thirty Thousand ($30,000.00) Dollars, subject to mortgage liens aggregating Eleven Thousand Six Hundred Eighty-three ($11,683.85) Dollars and eighty-five cents, and the said J. L. Niday did not pay to the said R. E. Green any valuable or adequate consideration for the real property described in said deeds, which constituted all the real property then or thereafter owned by the said R. E. Green.

XXI.

That at the time and times when each of said deeds were purported to be executed by the said R. E. Green, the said R. E. Green was not competent to execute the same, and did not have full knowledge of the contents and effect thereof, and the plaintiff is informed and believes and therefore alleges the fact to be, that the said R. E. Green re-

ceived no independent advice concerning the contents and effect of said deeds independently of the advice and suggestions of the grantee therein named, who was the defendant J. L. Niday, the son-in-law and legal and confidential advisor of the said R. E. Green.

XXII.

That since the procurement of said deeds, the said defendants J. L. Niday and Mollie Green Niday have appropriated to their own use the entire proceeds and profits of said real property, and have not accounted for the same to the plaintiff.

XXIII.

That the plaintiff is informed and believes, and, therefore, alleges the fact to be that the defendants J. L. Niday and Mollie Green Niday have attempted to convey the property described in said deeds to the defendants George A. Buell and Effie Ada Buell and A. L. Green, and that said defendants and each of them received said conveyance with full knowledge of the outstanding claim of the plaintiff, and had knowledge of facts sufficient to put them on inquiry, and that said conveyance was attempted to be made by the said J. L. Niday for the sum of Thirty Thousand ($30,000.00) Dollars.

XXIV.

That Gratia Green Acuff and Philo F. Green, the said children of the said R. E. Green, have sold, assigned and transferred to the plaintiff for a valuable consideration all their right, title and interest

in and to the real property described in paragraph VIII of this bill of complaint, and the plaintiff is the bonafide owner and holder of said claims for value.

XXV.

That George L. Green and J. M. Green have settled with the defendant J. L. Niday their claims against the estate of R. E. Green, and have transferred unto the said J. L. Niday all their right, title and interest in and to the real property described in paragraph VIII of this bill of complaint.

XXVI.

That plaintiff has demanded from the defendants J. L. Niday and Mollie Green Niday an accounting and settlement of the rents, issues and profits of said real property, or in case of a sale thereof, of the proceeds arising therefrom, and such demand has been refused.

XXVII.

That this is a suit between citizens of different states, and the amount in controversy exceeds the sum of Three Thousaid ($3,000.00) Dollars, exclusive of interests and costs.

XXVIII.

That plaintiff herein has no plain, adequate or speedy remedy at law, but only in equity.

WHEREFORE, plaintiff prays:—

First. For a decree of this Court declaring null and void the deeds of conveyance from the said R. E. Green to the said J. L. Niday, and directing that

the said J. L. Niday and Mollie Green Niday, his wife, execute and deliver to the plaintiff a deed of conveyance to said real property within thirty days from the date of the decree of this Court, and in event of the failure of said defendants to make such deed, that the decree of this Court stand in lieu thereof.

Second. For a decree of this Court declaring null and void the purported deed of conveyance from the defendants J. L. Niday and Mollie Green Niday to the defendants George A. Buell, Effie Ada Buell and A. L. Green, or for a decree declaring that the said last named defendants hold said real property in trust for the plaintiff, and directing the said defendants deliver to the plaintiff, within thirty days from the date of the decree of this Court, a deed to said real property, and in the event of their failure so to do, that the decree of this Court stand in lieu thereof.

Third. For a decree of this Court directing that the defendants J. L. Niday and Mollie Green Niday render unto the plaintiff an accounting of all profits and proceeds arising from the use of said real property, or in the event that the Court finds that a bonafide sale of said real property has been made, that defendants J. L. Niday and Mollie Green Niday account to the plaintiff for all the proceeds arising from such sale, and deliver to the plaintiff any securities received on the purchase price of said property.

Fourth. That the defendants and each of them be enjoined from making any disposition of said real property during the pendency of this suit.

Fifth. That plaintiff have and recover of and from the defendants her costs and disbursements herein incurred.

Sixth. That plaintiff have such other and further relief as the Court may deem equitable and proper.

Seventh. That the Court grant unto the plaintiff an order directing the issuance of a subpoena to each and all of the defendants commanding them and each of them to appear before this Court on a day certain to be named to answer the allegations of this complaint under penalty therein named.

HUGH MONTGOMERY,
PLATT & PLATT,
Solicitors for Plaintiff.

(Duly Verified)

Endorsed: Filed March 23, 1920.
W. D. McREYNOLDS, Clerk.

In the District Court of the United States in and for the District of Idaho, Southern Division.

JULIA GREEN GRAEF,
Plaintiff,

vs.

GEORGE A BUELL and EFFIE ADA BUELL, his wife, and A. L. GREEN, et al.
Defendants.

No. 759.

ANSWER.

COMES NOW the defendants George A. Buell and Effie Ada Buell, his wife, and A. L. Green and for answer to the plaintiff's complaint admits, denies and alleges:

I.

The defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiff's bill of complaint.

II.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraph nine of the bill of complaint and therefore deny said allegations.

III.

These defendants admit the allegations contained in paragraph 10 of the plaintiff's bill of complaint.

IV.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the plaintiff's bill of complaint and therefore deny each and all of said allegations.

V.

These defendants deny that they received the conveyance mentioned in paragraph 23 of the plain-

tiff's bill of complaint with full knowledge or of any knowledge for the outstanding claim of the plaintiff or that they or either of them had knowledge of any fact or facts sufficient to put them on inquiry.

VI.

These defendants or either of them have not sufficient knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraphs twenty-four and twenty-five and twenty-six of plaintiff's bill of complaint and therefore denies said allegations.

VII.

These defendants further answering the said complaint and by way of cross-complaint allege:

1. That during the year 1918 these answering defendants purchased of J. L. Niday and Mollie Green Niday the following described real property, to-wit:

> The Southwest Quarter (SW¼) of the North west Quarter (NW¼) and Lots Two (2) and Three (3) and that part of Lot Four (4) lying north of the right of way of the Oregon Short Line Railway Company, and the East Half (E½) of the Southwest Quarter (SW¼) except about three acres theretofore deeded to the Nampa and Meridian Irrigation District, all in Section Thirty-one (31), in Township Three (3), North Range One (1), West of the Boise Meridian, containing about two hundred six (206) acres in Canyon County, Idaho,

and paid to said J. L. Niday and Mollie Green

Niday the full purchase price therefor and that at the time of said purchase, and payment of the consideration therefor, they had no knowledge or any notice of any claim or demand of the said plaintiff's or either of them against the said property or that said plaintiff or either of them claimed any right title, or interest in or to the said property.

2. That these defendants now owners of the above described real property are in possession of the same; that the plaintiffs Julia Green Graef, and Gratia Green Acuff and Phil F. Green, claim some right, title or interest in or to said property or some portion thereof, but that said right, title or interest of said plaintiffs and each of them is subordinate and inferior to the right, title and interest of these defendants.

WHEREFORE, These defendants pray judgment of the Court quieting their said title against all claim and demands whatsoever of these plaintiffs, and that these defendants may recover their costs herein.

ALFRED A. FRASER,

Attorney for Defendants, George A. Buell, Effie Ada Buell, and A. L. Green, Residing at Boise City, Idaho.

STATE OF IDAHO)
) ss.
COUNTY OF ADA.)

Alfred A. Fraser being first duly sworn deposes and says that he is the attorney for the defendants in the above entitled action and that he has read the

foregoing answer and knows the contents thereof, and that he believes the same to be true. The reason this verification is made by the attorney is that the defendants and each of them are non-residents and absent from Ada County, Idaho, the County in which the said attorney resides.

ALFRED A. FRASER.

(Seal)

Subscribed and sworn to before me this 13th day of April, 1920.

C. A. CARTER,
Notary Public, in and for the State of Idaho.

Filed Apr. 13th, 1920.
W. D. McREYNOLDS, Clerk.

In the District Court of the United States in and for the District of Idaho, Southern Division.

JULIA GREEN GRAEF,
Plaintiff,

vs.

J. L. NIDAY and MOLLIE GREEN NIDAY, his wife, GEORGE A. BUELL and EFFIE ADA BUELL, his wife, and A. L. GREEN,
Defendants.

No. 759.

ANSWER.

Comes now the defendants J. L. Niday and Mollie Green Niday, his wife, and for answer to the bill of complaint herein admits, denies and alleges:

I.

The defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiff's bill of complaint.

II.

These defendants deny that immediately prior to the first day of October, 1915, or on said date, that portion of the above described real property located in section thirty-one (31) was worth or of the reasonable value of thirty thousand ($30,000.00) dollars or of any other value greater than the sum of fifteen thousand ($15,000.00) dollars.

III.

These defendants admit the allegations contained in paragraph ten of plaintiff's bill of complaint.

IV.

These defendants deny that for some time prior to the 22nd day of December, 1914, the said J. L. Niday acted as attorney, counselor, legal advisor, or confidential advisor of the said R. E. Green and denies that such confidential relation continued continuously up until the time of the death of the said R. E. Green, but defendants allege that the said R. E. Green in his life time counseled said J. L. Niday, as an attorney at law in regard to certain specific legal matters, but that on the 22nd day of December, 1914, or on the 1st day of October, 1915, the relationship of attorney and client did not exist between said R. E. Green and said J. L. Niday and that there was then pending no unfinished legal

business in which the said J. L. Niday was acting as attorney or counsellor for said R. E. Green.

V.

Defendants admit the allegations contained in paragraph twelve of plaintiff's bill of complaint but deny that the said defendant Mollie Green Niday received any greater portion of the personal property of the estate of R. E. Green than any other of his heirs.

VI.

These defendants deny the allegations contained in paragraph thirteen of the bill of complaint that the wife of said R. E. Green "was a woman of sound business judgment."

VII.

These defendants answering the allegations contained in paragraph fourteen of the bill of complaint admit that the said R. E. Green was greatly shocked at the sudden death of his wife but deny that her death caused his nerves or mental faculties to weaken and denies that this condition continued until the time of his death or at all.

VIII.

These defendants deny that the said R. E. Green was extremely or at all susceptible to the influences or suggestions of those who were in close and confidential relations with him and denies that he was susceptible to the influences or suggestions of said J. L. Niday and deny that the said J. L. Niday was his legal or confidential advisor and deny that

said R. E. Green was susceptible to the influences or suggestions of the defendant Mollie Green Niday, and these defendants deny that for a period of time prior to to the 22nd day of December, 1914, or at any time prior thereto the said R. E. Green was in such a mental condition that his mind was not a safe guide for his actions and deny that such condition was continuous or that the same became gradually worse until the time of his death.

IX.

The defendants deny that said J. L. Niday and Mollie Green Niday, his wife, during the years 1914, 1915 and 1916 or at any other time or at all entered into a conspiracy to cheat or defraud the said R. E. Green out of his property or to cheat or defraud the heirs of the said R. E. Green out of their legal interests in his property and deny that in furtherance of such conspiracy they or either of them did in November, 1914, or at any other time take over the management of the affairs of the said R. E. Green and defendants deny that they caused the said R. E. Green to be removed against his wishes or caused him at all to be removed from Nampa, Idaho, to a house in Boise belonging to the said J. L. Niday, and deny that they caused the said R. E. Green to remain in said house until the time of his death.

X.

These defendants deny that for the further carrying out of said conspiracy to cheat or defraud the

said R. E. Green out of his property or for any other purpose the said J. L. Niday and Mollie Green Niday, caused the said R. E. Green to execute and deliver to said J. L. Niday a Warranty Deed to the real property designated as "A" and described on page three of the bill of complaint, and these defendants deny that they or either of them caused the said R. E. Green to be brought against his will to Boise or placed in the house of said J. L. Niday and these defendants deny that none of the lineal descendants knew of the execution and delivery of this deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

XI.

These defendants deny that for the further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property or for any other reason at all the said J. L. Niday and Mollie Green Niday acting secretly or clandestinely or at all caused the said R. E. Green to execute or deliver to said J. L. Niday a Warranty Deed to the real property designated as "B" and described on page three of the bill of complaint and these defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations in paragraph eighteen of the plaintiff's bill of complaint to the effect "that the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known

to this plaintiff," and therefore deny said allegations.

XII.

These defendants deny that at the time when each of said deeds were made, executed and delivered that the said R. E. Green was in such a condition mentally and physically that his mind was not a safe guide for his actions and deny that he was not capable of transacting business and deny that he was directly or at all subject to the influence of said J. L. Niday, and deny that said J. L. Niday was at such time his legal or confidential advisor and deny that he was at all subject to the influence and suggestions of the defendant Mollie Green Niday, and defendants deny that said deeds or either of them was procured by the said J. L. Niday through the exercise undue or any influence over the mind of said R. E. Green, and denies that the mind of said R. E. Green was at all weakened at said time.

XIII.

The defendants deny that at the time of the execution and delivery of the deeds mentioned in the bill of complaint the real property covered thereby was of the actual and reasonable value of more than thirty thousand ($30,000.00) dollars or of any value whatsoever in excess of fifteen thousand ($15,000.00) dollars and these defendants deny that said J. L. Niday did not pay to said R. E. Green

any valuable or adequate consideration for the real property described in said deeds.

XIV.

These defendants deny that at the time and times when each of said deeds were executed by the said R. E. Green was not competent to execute the same and deny that he did not have full knowledge of the contents and effect thereof, and these defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer as to whether or not the said R. E. Green received no independent advice concerning the contents and effect of said deeds therefore denies the same and denies that said R. E. Green at the time of the execution and delivery of said deeds or at any other time said R. E. Green received any advice or suggestions in regard to the same from the said J. L. Niday.

XV.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph twenty-three of the bill of complaint to the effect that the defendants George A. Buell, Effie Ada Buell and A. L. Green received the conveyance of said property with knowledge of the claim of the plaintiff or had knowledge of any facts sufficient to put them on inquiry and therefore denies said allegations.

XVI.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph twenty-four of the bill of complaint to the effect that Gratia Green Acuff and Philo F. Green have sold, assigned and transferred to the plaintiff for a valuable consideration of their rights, title and interest in and to the real property described in paragraph eight of the bill of complaint and that the plaintiff is the bonafide owner and holder of the said claims for value and therefore denies said allegations.

XVII.

These defendants deny that said George L. Green and J. M. Green have settled with defendant J. L. Niday any claims against the estate of R. E. Green and these defendants deny that said George L. Green and J. M. Green ever had any valid, legal or lawful claim against the said estate.

XVIII.

WHEREFORE, These defendants pray that the action may be dismissed, that the plaintiff take nothing by her complaint and the defendants recover their costs and for such other and further relief as may be just and equitable.

ALFRED A. FRASER,

Attorney for Defendants, J. L. Niday and Mollie Green Niday, Residing at Boise City, Idaho.

STATE OF IDAHO,)
) ss.
COUNTY OF ADA.)

J. L. Niday being first duly sworn upon his oath deposes and says that he is one of the defendants in the above entitled action, that he has read the foregoing answer and knows the contents thereof; and that he believes the facts therein stated to be true.

J. L. NIDAY,

(Seal)

Subscribed and sworn to before me this 13th day of April, 1920.

C. A. CARTER,
Notary Public, in and for the State of Idaho.

Filed Apr. 13, 1920.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

DECISION.

Oct. 23, 1920.

Platt & Platt, Hugh Montgomery,
Attorneys for Plaintiff.

Alfred A. Fraser,
Attorney for Defendants.

DIETRICH, DISTRICT JUDGE.

The defendant J. L. Niday, who will be referred to as the defendant, holds the title to two hundred and twelve acres of farm land in Canyon County,

Idaho, which the plaintiff contends rightfully belongs to the heirs of R. E. Green, deceased. The only heirs of the deceased are his six children, two of whom are the plaintiff and the defendant's wife. The defendant is an attorney at law. Green was a civil engineer, and came to Idaho in 1890, to take charge of a canal system and certain lands irrigated thereby, for eastern investors. He himself acquired several tracts lying under the system, aggregating five or six hundred acres, upon one of which, the two hundred and twelve acres in controversy, he established his home, referred to in the record as Greenhurst. Upon it he constructed a large but not very substantial house of twelve rooms, and outbuildings for storing grain, sheltering livestock, and for other purposes. For several years—until it was sold—he had the management of the canal system, and thereafter he continued in charge of certain of the lands still belonging to the eastern investors or their estates. To his professional training and general culture he added a taste for literature and the fine arts. In the matter of business he appears to have had a capacity for administration and office details, but apparently he did not possess in a high degree the qualities requisite to success in independent enterprising. In 1909 his wife, who had assumed the leadership insofar as concerned his own business affairs, suddenly died as the result of an accident. Grief-stricken and under the necessity of taking the ini-

tiative without the assistance of his wife, he became deeply involved in debt. By 1914 so apparent had it become that he could not make a success of his affairs that the defendant and some of his children induced him to come to Boise to live. He was then seventy-eight years of age. A small home was rented for him, and he, together with his mother-in-law, was cared for by his deceased wife's sister. The defendant and his wife also lived at Boise. Two of the other children lived near by most of the time, and the others at more distant points.

For more than twenty years prior to 1914 the deceased had been on very intimate terms with the defendant, not only by reason of family ties, but through professional relations and friendly association. To him rather than to his own sons he looked for counsel and guidance when he fell into financial distress. When he came or was brought to Boise from the farm he owed debts exceeding in the aggregate forty thousand dollars. With the assistance of the defendant he negotiated terms of settlement with certain mortgage creditors, by which they satisfied all outstanding unsecured claims, as well as their mortgages, in consideration of deeds to the mortgaged property. With the largest creditor, holding claims for about eighteen thousand dollars, this settlement was made upon the further consideration that the deceased should have the right to repurchase the property within a stated period for the face value of the claim. The upshot

of these settlements was that the deceased was left with the option to repurchase, as already explained, and the two hundred and twelve acres in controversy, two hundred and six acres of which was subject to two mortgages aggregating between eleven and twelve thousand dollars. Upon completing the settlement he at once (on December 22, 1914) executed a deed to defendant for six acres, the only unincumbered property he had, the deed reciting a consideration of one dollar. The instrument was withheld from record until February 19, 1916. On October 1, 1915, he executed another deed to defendant, reciting a consideration of one dollar and other valuable considerations, covering the other two hundred and six acres, subject to the mortgages, which the defendant assumed and agreed to pay. This deed was withheld from the records until May 27, 1916. In the meantime, in the early part of 1916, Green had a severe attack of pneumonia, from the effects of which, both physical and mental, he did not fully recover, and he died in March, 1917.

The witnesses are widely at variance touching Green's mental condition when the two deeds were executed. Upon certain occasions he acted strangely, but not in such a manner or to such an extent as to warrant a finding of total incompetency. That certain of his faculties were much impaired cannot be doubted. To use a common phrase, it was an extreme case of second childhood. It may very well be that the more or less common tendency to

such mental reversion in the aged was hastened and accentuated not only by the shock of his bereavement, but by the consciousness of business defeat, with the attendant feeling of humiliation and loss of confidence in himself. However that may be, it is plain that when he came or was brought from Greenhurst to Boise his family entertained the view that he was in need of a measure of the care and protection appropriate to a child. That he continued to gratify his taste for reading and was able to discuss, and at times manifested an interest in, the fine arts, is not highly material. Such capacity the immature may have, and yet be quite incompetent touching their property rights and financial interests. Nor does his conduct in making adjustment with his creditors necessarily imply mental vigor. He was there treating with strangers, with the zealous and able assistance of the defendant. It was quite another thing for him unaided to deal with a member of his own family or a close personal friend in whose judgment and fair intent he had implicit confidence. Against such a one he would have neither the capacity to be wary nor the strength of will to make resistance. In view of his mental condition and the relation of confidence which had long existed between him and the defendant, no transfer by which the latter would secure any undue advantage could be permitted to stand, even though there might be no actual intent to defraud or overreach. In such a case the bur-

den would be upon the defendant to show the fairness of the transaction.

Directly we have only the defendant's testimony relative to the circumstances surrounding the transfers. As to the first deed, he explains, in substance, that when the settlement was made with creditors he induced them to release this small tract, and thereupon Green deeded it to him, with the statement only that he, Green, would have to call on the defendant for money from time to time. It does not appear that any price was fixed, or what amount, if anything, was ever paid by defendant on account of the transaction, or that the defendant ever recognized that he was under any legal obligation whatsoever; nor is any reason given why the actual consideration was not specified in the deed. As to the second conveyance, for the two hundred and six acres, we are advised that Green came to the defendant's office upon the date of the execution of the deed, and, stating in substance that the defendant had been kind to him and had rendered him many professional services, offered to deed the entire property, further explaining that if he, the defendant, didn't take it, it would in time pass into the hands of the mortgagee. The defendant, in effect conceding that the property was worth approximately three thousand dollars in excess of the indebtedness, testified that the reasonable value of his professional services exceeded that amount. But it does not appear that he ever kept any account

of such services or entered any charges therefor or suggested or intimated to Green that he expected compensation. And now we have only his general estimate of value, without any attempt to itemize or advise us of the extent or character of the services rendered. It is clear, I think, that there never was any intention to make a charge. Without advising Green of the consequences of the suggested step or attempting to dissuade him therefrom, defendant promptly accepted the offer and prepared the necessary deed, which was forthwith executed and delivered. Upon such delivery the grantor, a helpless old man, stood penniless, except for such contingent interest as the defendant had had the foresight to have reserved to him in the option to which we have referred. In view of all of the circumstances, the transfer to the defendant was not merely improvident; unless attended by an understanding that the title was to be taken in trust, or that the defendant assumed some obligations of support, touching which there is no testimony, the act was scarcely rational. No exigency had suddenly arisen. There was no imminent peril. The mortgage would not be due for three or four months. The mortgagee could not hope to secure a decree short of several months after the maturity of the indebtedness, and after foreclosure sale the deceased would have a year in which to redeem. Hence approximately two years must elapse before he could be divested of title by any involuntary pro-

ceedings, and in the meantime he might be able to effect a sale by which he could save something out of the wreck. Or, as an alternative, there was the possibility of making a fair settlement with the mortgagee, with an option to repurchase as in the other case. There was a very substantial margain even if the land was worth only fifteen thousand dollars, and when it is borne in mind that a shrewd, successful man of affairs had taken a mortgage upon it for approximately twelve thousand dollars, it is difficult to believe that it was not worth to exceed fifteen thousand dollars, the general rule being that mortgages are taken only for about fifty per cent of the value. Under the undisputed facts and the explanation of the defendant, it is unthinkable that either he, as a disinterested party, or any other competent person, would have advised or approved of such a transfer. Added to the inherent unreasonableness of the transactions,—if we assume the deeds to have been absolute and without other consideration,—is the circumstance that both instruments were for a long time withheld from record, and that in the case of each, after its execution and delivery, the grantor, acting under the direction of the defendant, represented to public officials that he was still the owner. But without further extending the discussion, it is sufficient to say that no theory or explanation of the transaction has been suggested upon which the transfers can be sustained. If upon the one hand we reject the

thought of deliberate, positive fraud on the part of the grantee, and upon the other the idea of total want of mental capacity in the grantor, we are left to assume either that the latter executed the instruments with an understanding of some kind of a trust or that he acted under a species of undue influence. Surely we cannot assume that acting with competent understanding he deliberately and without compulsion or consideration sought to pauperite himself. There are circumstances in the record tending to the view that he understood that he was to be the beneficiary of such value as the property actually had, but it is scarcely sufficient for a finding to that effect. Nor does the record expressly disclose a design in the defendant to unduly influence. But that is not essential. Whether we adopt one theory or the other the result is the same, and in view of the intimate relations of confidence between the parties, the age and impaired mentality of the grantor, and the want of adequate consideration, there is a strong presumption against the validity of the transaction, and this the defendant has failed to overcome. The law is well stated in Highberger v. Stiffler, 21 Md., 352: "Wherever," says the Court, "a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against over-

weening confidence, will interpose to prevent a man from stripping himself of his property." And see also Crabb v. Watts, (Ore.), 249 Fed. 357; s. c., 257 Fed. 718; Cadwallader vs. West, 48 Mo. 483; Cornet vs. Cornet, 154 S. W. 121. As was said by the Supreme Court of Kentucky, in Price vs. Meade, 207 S. W. 695, 697: "The law looks with jealous and inquiring eye on a deed made by an old and infirm person to a young relative or associate for inadequate consideration, where the grantee has opportunity to influence the mind of the grantor, especially where no reasonable provision has been made by the grantor for his own children or nearest blood relation." See also Nesbit v. Lockman, 34 N. Y. 167.

Apparently the defense most confidently put forward by the defendant is laches. Clearly I think the plaintiff has not been wanting in reasonable care and diligence. She resided at Portland, Oregon, and was not intimately familiar with her father's affairs. She did not know of the transfers until 1918, and thereupon some correspondence ensued and negotiations looking to an adjustment were had, but with no result. And in 1919 she commenced a suit in the state court. When we consider that the controversy is between relatives, where there is a natural reluctance to litigate, and that, the grantor being dead, there was no direct source of information except the defendant himself, it is not strange that suit was for a time withheld. Nor

does it appear that there was negligence in first commencing the suit in the state court, and dismissing it there for the reason given.

With much greater force the defense can be urged against the interests which the plaintiff holds by assignment from a brother and a sister. It is thought that they acquired some knowledge of the deeds soon after their father's death. They still held their interests when the suit was commenced in the state court, and were there co-plaintiffs with this plaintiff. It was therefore about two years after they learned of the deeds before they took action in the state court, and about three years before this suit was commenced. But under the circumstances it cannot be said that this was an unreasonable delay. The interest that one of the heirs can claim is not in any view of great value, and the financial ability of the two assignors was such that they could not be expected incautiously to enter upon expensive litigation. It is not a case where one party permits another to take all the chances of an enterprise, and then, after success is assured, demands a share of the fruits, where he has been unwilling to share in the risks. If when the defendant disclosed to those assignors the fact that he held the deeds, he had offered to permit them to come in upon an equal footing with him, and thus share the chances of loss as well as of gain, and they had thereupon failed promptly to avail themselves of the opportunity, the defense

would present an entirely different aspect. The defendant was left to take few, if any, chances, after he disclosed the fact that he held the deeds. He had paid off the mortgages, and he made no considerable outlay thereafter; and as to the discharge of the mortgages, the value of the land was at all times at least sufficient to protect him against loss upon that account. He was not expending large sums in improvement or development, and the rentals were enough to return a small rate of interest after paying all expenses of maintenance and operation. In any decree which may be made, he may be fully protected; by restoring to him what he has paid out and awarding to him fair compensation, complete equity will be done.

As to the other defense, that the plaintiffs have not offered to reimburse the defendant for his outlay in discharging the mortgages, that is a matter touching which he may be fully protected in the accounting. Had the objection been raised at the threshold, the plaintiff might have been required expressly to plead an offer to do equity, but the defense is suggested now for the first time. Without more specific knowledge as to the defendant's rights, plaintiff could not have intelligently made a tender, and a general offer to do equity is of little value. Full protection of the defendant can now be required as a condition to granting the plaintiff any relief.

By agreement the securities received by the defendant upon a sale of the premises are, for the purposes of the decree, to be held in lieu of the lands. An accounting will therefore be taken upon the following basis: The defendant will be allowed at the rate of eight per cent upon moneys expended by him in protecting the title and in maintaining and operating the property, and will be charged at the same rate upon receipts. He will also be allowed a reasonable compensation for supervision and risk. The net amount thus appearing to be due him will constitute a first charge against the securities, and one-half thereof the plaintiff will be required to pay within a reasonable time to be hereafter fixed. The defendant will also be allowed a commission, at the current rate charged by real estate brokers, for selling the property, such commission to be paid out of the proceeds of the securities when the same are collected. One-half of the residue realized out of such securities, after reimbursing and compensating the defendant, will be awarded to the plaintiff.

Unless the parties can agree upon such an accounting, a further hearing will be had for the purpose, upon the suggestion of either party.

Endorsed: Filed Oct. 25, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

INTERLOCUTORY DECREE.

Now at this time this cause came on to be heard on motion of the plaintiff appearing by Hugh Montgomery, her attorney of record, and defendants appearing by A. A. Fraser, their attorney of record, and the court being fully advised:—

And it having been found that under the circumstances and conditions attending their execution, that certain deed bearing date the 22nd day of December, 1914, recorded on the 19th day of February, 1916, in Book 75, page 13, of the Deed Records of the County of Canyon, State of Idaho, from R. E. Green, a widower, to J. L. Niday, conveying the following described real property, to-wit:

> That part of the northeast quarter of the northwest quarter of Section 6 in Township 2 North, Range 1 West of Boise Base and Meridian, lying North and East of the right of way of the Oregon Short Line Railway Company, containing 6 acres of land, more or less, situated in Canyon County, State of Idaho; together with the ditches and ditch rights, and a water right consisting of 4 miners inches of the waters of what is commonly called the Ridenbaugh canal, owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof,

and that other certain deed bearing date the 1st day of October, 1915, from R. E. Green, a widower, to J. L. Niday, recorded on the 27th day of May, 1916, in Book 74, page 252, of the deed records of

Canyon County, State of Idaho, conveying the following described real property, to-wit:

> The southeast quarter of the northwest quarter and lots numbered 2 and 3, and all that part of lot numbered 4 lying north and east of the right of way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa and Meridian Irrigation District, all in Section 31, Township 3 North, Range 1 West, Boise Base and Meridian, containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in any wise appertaining,

are voidable at the instance of the grantor and his heirs.

And said lands prior to the commencement of this suit having by the said J. L. Niday, grantee named in said deeds, been sold and conveyed to George A. Buell and Effie Ada Buell, his wife, and A. L. Green, for a valuable consideration paid and to be paid to said J. L. Niday. And all of said heirs, either in person or through their assignees, and all parties to the suit having during the progress of the trial agreed in open court that the proceeds of said sale paid and to be paid to said J. L. Niday should stand and be considered by the Court in lieu of said lands, and having upon that condition expressed the desire that said sale be confirmed.

Now, therefore, it is ordered and adjudged that the title of said lands be, and the same is, hereby confirmed in said purchasers, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and that the heirs and parties hereto be recognized and treated as having such rights and interests in said proceeds of said sale as they would otherwise have in and to said lands.

It is further adjudged that in her own right as an heir, and as assignee by virtue of assignments from Philo F. Green and Gratia K. Acuff, two other heirs of said R. E. Green, deceased, the plaintiff is, subject to the conditions hereinafter named, entitled to a one-half interest in and to all of said proceeds.

And as a result of and in accordance with an accounting had by agreement of counsel, in harmony with certain rulings and directions of the Court, by which the said J. L. Niday is charged with all income received by him from said lands, including moneys actually paid to him on account of said sale, together with interest thereon, and is credited with all disbursements in caring for, maintaining, and protecting the title to said lands, with interest, including an allowance of $900.00 for his personal services in that respect, and $1500.00 as commission for effecting said sale, and the additional sum of $900.00 advanced by him to the said R. E. Green following the execution of the said

deed of December 22, 1914, and in connection therewith, it is further adjudged that there is due said J. L. Niday, chargeable against the whole of said proceeds still unpaid, a balance of $8,626.93, one-half of which, namely, $4,313.47, is chargeable against the one-half interest to which, as aforesaid, the plaintiff is conditionally entitled.

Accordingly it is further adjudged and decreed that upon the payment or tender by the plaintiff to the said J. L. Niday of said sum of $4,313.47, with interest thereon from the date hereof at the rate of eight per cent per annum, on or before the first day of March, 1921, a final decree will be entered confirming in the plaintiff a one-half interest in and to that certain mortgage bearing date the 14th day of December, 1918, and recorded at page 279 of Book 70 of the Mortgage Records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the above described real property, together with an undivided interest in the note secured thereby, the same representing the balance of the purchase price for the sale of said lands not heretofore paid in cash to the said J. L. Niday. And upon the failure of the plaintiff to make such payment or tender within said time, the suit will be dismissed with prejudice. In case such payment is made as required, the final decree

will also provide for the custody and collection of said note and mortgage.

Jurisdiction is retained to make further adjustments in case of any disbursements or receipts by the said J. L. Niday in the intervening period on account of said note and mortgage, and for the modification of this order for good cause shown.

Dated this 23rd day of December, 1920.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Dec. 23, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

Now at this time this cause came on to be heard on motion of the plaintiff for a final decree, the plaintiff appearing by Hugh Montgomery, her attorney of record, and defendants appearing by A. A. Fraser, their attorney of record, and the Court being fully advised:—

And it appearing that since the entry of the interlocutory decree herein on December 23, 1920, and in compliance with the requirements thereof, the plaintiff has duly tendered to the defendant J. L. Niday the full sum of $4,313.47, together with interest thereon from the date of said interlocutory decree to the time of such tender, at the rate of

eight per cent per annum, and in all other respects has complied with the conditions and requirements of said interlocutory decree.

It is therefore ordered, adjudged, and decreed that the plaintiff, Julia Green Graef, is the owner of an undivided one-half interest in and to that certain mortgage bearing date the 14th day of December, 1918, and recorded at page 279 from book 70 of the mortgage records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the property particularly described in the interlocutory decree, together with an undivided one-half interest in the note secured thereby, the same representing the balance of the purchase price for the sale of said lands not heretofore paid in cash to the said J. L. Niday.

And the parties hereto having this day filed herein their stipulation in writing providing for the temporary custody and ultimate disposition of said $4,313.47, and interest thereon, heretofore tendered to the defendant J. L. Niday, and also for the custody, collection and disposition of the proceeds of said note and mortgage.

It is further ordered that said stipulation be, and the same is, hereby approved, and accordingly it is ordered that within ten days from the date hereof the plaintiff deposit in the Boise City National Bank, of Boise, Idaho, said amount so tendered, and

that the defendant J. L. Niday deposit in said bank an assignment in due form of a one-half interest in and to said note and mortgage, together with said note and mortgage, properly endorsed to the plaintiff without recourse, all in accordance with the terms of said stipulation.

It is further adjudged and decreed that in all other particulars not herein expressly referred to said interlocutory decree of December 23, 1920, be, and the same is, hereby confirmed.

It is further adjudged and decreed that the plaintiff recover from the defendant J. L. Niday her costs herein incurred and heretofore taxed, namely, $258.42.

Dated this 26th day of February, 1921.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Feb. 25, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

APPELLANT'S STATEMENT ON APPEAL.

BE IT REMEMBERED that this cause coming on for trial before the Court on October 4, 1920, the plaintiff being represented by Mr. Hugh Montgomery, her solicitor, and the defendants by Mr. Alfred A. Fraser, their solicitor, the following proceedings were had:

The plaintiff, JULIA GREEN GRAEF, called as a witness on her own behalf, being first duly sworn, testified as follows:

I am the plaintiff in the present proceeding. I am the fourth child of Mr. R. E. Green, deceased. There were six children in the family. My father was a kindly, refined, intellectual man, whose business was mostly devoted to office work. For many years he was active manager of the Boise and Nampa Canal Company, a man given to books, art studies, and things of nature. My mother was an energetic, active, alert business woman. My mother was the active manager of the ranch owned by father and mother. Father and mother first went to live at Greenhurst in the year 1900. Prior to that time we lived in Boise. My father was about sixty-four years old when they moved to the ranch called "Greenhurst." My mother was forty-five or forty-six. She died in the year 1909. I went to Greenhurst the day before the funeral. I stayed two weeks. After the death of my mother my father seemed stunned and broken. I next saw father about 1911. I went to the ranch on a visit at that time. Our father had always been a great reader. After mother died he just seem to sit down with a book and quit. He would sit there by the hour and read, instead of being chatty as he used to be. I next saw father in the fall of 1914. He no longer attended to any business. He puttered

around the yard, sat, read, and dozed by the hour. Mr. and Mrs. Niday were attending to his business at that time. Mrs. Niday kept up a correspondence with me and mentioned in letters that dad had moved to Boise. They were quite friendly letters. I have not kept them. I had no oral discussion with her to any great length about father's affairs. I next saw father in 1917. Father seemed just about—well, his collective faculties were gone. He would start to tell you something and he couldn't talk consecutively. He would just end off in a mumble. I saw him in 1912. He came down to the beach and stayed a short time. His interest seemed gone even then. He would go down to the library and get two books a day. Go back every morning and change those books. Would buy every magazine he could find and just sit and read. At the time of my interview with father in the summer of 1915 I had just scattered conversations with the defendant J. L. Niday concerning father's affairs. Mostly Mrs. Niday told me the condition of affairs. I was there about two weeks. Mrs. Niday explained to me prior to that in letters and during that time that they had taken charge of father's affairs, that they were in a complicated condition, and that they had moved him to Boise. Neither Mr. or Mrs. Niday at that time advised me that father had executed and delivered to the defendant J. L. Niday a deed to the property known

as Greenhurst. I first learned of that fact in the spring of 1918, over a year after father's death. Mrs. Egbert, my aunt, came to Portland on a visit, and in a conversation asked us if we didn't know that Niday had a deed to Greenhurst.

Plaintiff's exhibits 1 and 2, being certified copy of a deed dated December 22, 1914, and certified copy of a deed dated October 1, 1915, admitted in evidence.

The summer following the removal of father to Boise Mr. Niday at one time told me that father hadn't been capable of attending to his affairs in his opinion since mother died.

CROSS-EXAMINATION.

By MR. FRASER.

I was present at Greenhurst the day before mother's funeral. Father at that time seemed very much broken up by the death of his wife. Father relied a great deal upon mother in a business way. She was the active business manager, and it seemed to take his prop away. My father was certainly a pretty good business man. He occupied responsible positions in this state. He was active manager of the Boise and Nampa Irrigation canal for a number of years; had charge of the running of the canal, collecting all moneys due, and hiring the men. He was the head of that business. My mother did not run the canal and took no part in it. At one time he was representing

parties who owned several thousand acres of land here. He took care of that business also, satisfactorily as far as I know. My mother took no part in the transaction of that business. My father was a rather highly educated man. He took great interest in books and magazines. I stated that at Seaside my father would go down to the library and get a couple of books each day and come home and read them, and that he would buy a great many magazines. That was a habit of my father's more or less for a great many years, but not to that extent. He had not a great deal more leisure at Seaside to read these books than while attending to business. There were children and other things to take his attention. I saw my father in January, 1917. He had been ill and in the hospital. I know he was in the hospital in 1917 through letters received from my sister. She also telegraphed it. She wrote me that he was suffering from pneumonia. I first discovered the fact that Greenhurst had been deeded to Mr. Niday in April, 1918. I was in Portland at that time. After she informed me I wrote to Mr. Niday in regard to the matter. I asked for an explanation. A suit was filed in the state court to set aside this conveyance to Mr. Niday prior to the beginning of this suit. A suit similar to the present one was filed in Canyon County. It was transferred to Ada County for trial. After the transfer to Ada County I had the

suit dismissed and then filed the present suit. In the action in the state court the parties plaintiff with myself were Gratia Green Acuff and Philo F. Green. Gratia Green Acuff is my sister and Philo F. Green is my brother. Gratia Green Acuff resides at Rupert, Idaho, and Philo F. Green resides at Jerome, Idaho. They resided there at the time of filing the complaint in the district court of this state, and they reside there at the present time. I have purchased their claims and have an assignment of them.

Q. For what purpose?

A. For the purpose—

Q. Why did you purchase these claims and take these assignments?

A. They became tired and impatient of the delay, and were willing.

Q. Was it for the purpose of bringing an action in this court?

A. I don't know that it was especially.

Q. I am asking you were you not informed that in order to bring this action in this court that you had to become the purchaser of their claims, they being residents of this state?

A. Not that I had to do it. They offered to sell out prior to that.

Q. You were advised that you could not bring this action, were you not, unless you did do it, Mrs. Graef?

A. Mr. Graef largely attended to these details.

Q. Didn't he inform you of that fact?

A. Not especially. On a trip east he took their interest.

Q. Why did you dismiss in the state court; what was your reason?

A. That was up to Mr. Graef as my agent. Mr. Graef represented me in the matter. It was to expedite this case, I suppose. It was delayed in the other court.

I paid those other parties two hundred dollars each for their claims, in full of all demands. They have no interest in the result of this suit. I am the sole plaintiff.

Defendant's EXHIBIT 1

admitted to evidence.

That is my signature to defendant's exhibit No. 1. I wrote that letter. This letter is dated Portland, Oregon, March 27, 1917. I presume that is the correct date. It is addressed to "Dear Mr. Niday."

Q. I will call your attention to this statement in this letter: "I want you both to know that whatever you decide about father's affairs is all right with us." Whom did you mean by "us"?

A. Mr. Graef and I, under the impression that Mr. Niday was absolutely fair and square with father. We trusted him.

Q. Then this next, "We sincerely hope that you will be able to swing yourself out of the ranch debt." What ranch did you mean?

A. Greenhurst. Then when Mr. Niday got affairs adjusted it would all be straightened out. I did not know then that Mr. Niday had a deed to Greenhurst ranch. I meant that Mr. Niday would be able to adjust it and pay off whatever indebtedness was there. I meant that affairs would be straightened around. Mrs. Niday said Mr. Niday took charge and would pay up outstanding debts and when the ranch could be swung clear whatever was left would be divided among the children.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

The letters I destroyed which I received from Mrs. Niday were letters written by her before we learned of this deed. After we learned of this deed I wrote two letters to Mr. and Mrs. Niday, asking for an account of father's affairs for one thing, and being sent to all five other children, so that each would know the same thing. That was all we knew, just what Mrs. Niday had chosen to tell us. I wrote the second letter and asked for the items of debit and credit on father's affairs, and in neither case could I get them. After 1914 Mrs. Niday advised me that there was enough out of his property to maintain Mr. Green.

PLAINTIFF'S EXHIBITS Nos. 3 and 4 admitted in evidence.

Plaintiff's Exhibit No. 4 was received unsigned. It was just an omission and it was intended to be signed by Mr. Niday and was written by him. Plaintiff's Exhibit No. 3 is the answer to the first letter I wrote, asking for an accounting. Mr. Graef entirely handled the transaction of purchasing the two claims of Gratia Green Acuff and Philo F. Green. Receipts were issued to Mr. Graef. He was my agent. I know the contents of those receipts.

PLAINTIFF'S EXHIBITS Nos. 5 and 6, being the receipts above mentioned, admitted in evidence.

All the details of that transaction regarding the purchase of the claims of Mrs. Acuff and Philo Green were handled entirely by Mr. Graef. He made the arrangements, acting in my behalf. The proceedings regarding the dismissal of the case in Canyon County, Idaho, and the institution of the present one were carried on solely by my attorney. The action was taken solely by my attorney and not by me.

GRATIA K. ACUFF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the daughters of Mr. R. E. Green,

deceased, the fifth child. There were six of us altogether. I formerly lived at Greenhurst, about 1900. That was about the time father moved there to make their home. I lived there until my first marriage in 1910. After my marriage I often visited at Greenhurst. I lived within three miles. On the occasion of these visits I constantly saw my father. I was at Greenhurst at the time of mother's accident and her death. I was then in close association with my father as a companion. The effect upon father caused by the death of his wife was that he seemed crushed and broken. From that time on he never was cheerful and pleasant at all times like he used to be. He would have long fits of despondency, feeling being crushed, a tendency to get off by himself and wander around the hills alone. He was not allowed to do that. I went with him as his constant companion. I had been before and was after mother's death his companion. Feeling the need of greater association with him, I stayed with him constantly. During the later times, after my mother's death, he never talked during those walks. He would walk for miles and he wouldn't say a word. I went with him as caretaker, not in a sense of his seeming to need care, but companionship. He was very abnormal at this time compared to what he was before mother's death. Prior to that he was happy, talkative, helpful. At the time of mother's death I

would imagine father was about seventy to seventy-two years of age. My companionship with my father continued until his own death, at intervals. I was gone teaching. I was never gone more than five months. As the years progressed following the death of my mother this changed condition of father continued. He grew worse. In the summer of 1914 he was unable to help me as usual with the study of advanced English. He had always been prone to read a great deal and to study. He was very fond of narrating stories to me. He had no capacity to read a page of literature and tell what he read. He couldn't help me, and he knew he couldn't. He was conscious he was failing. He wanted to help, but couldn't. I asked him to help and he grieved that he couldn't help. He tried it and failed. He said he was not mentally alert enough to do it any more. He showed a continued unwillingness to take hold of things and let someone else do them instead. Unwillingness to mentally assert himself. Just mental inactivity. In 1914, right after my father had moved to Boise, my father did not know me on the street. I met him at the car track rather suddenly and expressed joy to see him. He didn't know me. He knew when to go downtown. He knew how to get off at 8th street corner because the car stopped there. He automatically got off the car, but when he came to go home he would not know always when

to get off at Alturas street to go home. He would get lost, could not find himself. The neighbors would sometimes bring him in. Sometimes I would find him. I have assisted him home under that condition during the year 1914. Mr. and Mrs. Dr. Patterson came often for him in the automobile to take him for drives. He enjoyed it very much. At those times he never would speak unless absolutely forced to. He was extremely abnormal. In the fall of 1914 after he came to Boise I have seen him in the presence of J. L. Niday and Mollie Green Niday. I made observation at that time of their attitude toward him. My sister Mrs. Niday's attitude toward him was not one of daughterliness or kindness. It was one of criticism, impatience. Mr. Niday frequently was impatient, trying to hurry him. This conduct upon their part had the effect of making him disturbed mentally and very unhappy. I always noticed from some time in early 1914 on the occasions of my father's association with Mr. Niday that after those meetings my father would be unhappy and disturbed. I could not get his confidence. I was his companion. I could not draw him out. I have seen him manifest trembling in the presence of Mr. Niday. In January, 1915, I went away from home to teach school. My father was extremely disturbed and worried because he was under the belief of pauperism. He grieved because he could not support me

without me working. He wanted the protection around me and he could not furnish it as he wished. That disturbed him. He expressed himself as poverty-stricken, living upon the bounty of Mr. and Mrs. Niday. He often talked to me of it. In 1915 I have seen him run down the street with his arms outstretched after Mrs. Wager, my aunt. She was keeping house for my father. Mrs. J. L. Niday, my sister, said to me that my father was off. That was often mentioned. The first time I can accurately remember it was along in December, 1914. In December, 1914, my sister, Mrs. Niday, tried to make my father do things that he could not help, do things that would overcome his infirmity. My father was afflicted with partial palsy and his hands could not be controlled. My sister attempted to have him keep his hands still. He felt this keenly because he couldn't do it. She addressed him impatiently in my presence, many times very unlovingly, about his forgetfulness and his mental condition. I have heard her say that he was crazy, not to him, but he heard it. I returned home in June, 1915. Mr. and Mrs. Niday seemed more aggressive at that time. My father felt shoved and pushed. My father would openly at times resent being hurried. He seemed not able mentally to grasp what was needed or wanted of him. I have heard and seen Mr. Niday speak impatiently to my father to hurry him to do business

affairs of some sort. What they were I don't know.

Q. What is that document you are referring to?

A. Those are my notes of dates, so that I will remember them.

Q. When were they made?

A. They were made when I knew positively that I would need them in the court-room. They were made when Mr. Graef took over the management of this case for us, some time last year.

I talked to my father in the fall of 1915. I tried to talk to him about his business affairs, but with no success. He was reticent. Every time I asked for information he would say that Mr. Niday was caring for it and it would be all right. In the spring of 1916 my father made a visit to my home during the summer months.

Q. Did you during the period of that visit notice any incidents or have any conversation with your father which would indicate his mental condition?

A. I did.

Q. State what it was.

Question objected to as the witness has testified to facts occurring long after the transfers sought to be set aside were executed and delivered and conditions might change between those times.

THE COURT: She may answer. The objection is overruled.

A. It was necessary when he came to my home to come with a young lady who brought him there. He was not able to travel alone. He would lose himself. He constantly interfered with the work of the workmen on the ranch until it was necessary to tell them that he was not entirely responsible. He displayed a very great tendency toward little, insignificant details that he was never troubled with before. For instance, when Mr. Acuff and I put father to bed he would insist on having his clothing, little details of clothing, right beside the bed where he could put his hands upon them. This was a mania with him. He would have me come downstairs at night, go into the clothes closet and tell him which clothes-hanger his coat was on. He would wring his hands and cry, "I have ruined my children." That would happen every few days while he was there. He would sit at first for hours, perhaps staring down, then perhaps straighten back in a limp condition of exhaustion and utter despair, and that was on his mind continually, that he had not done the right thing by his children, and he voiced it and spoke of it. Just prior to father's death Mr. Niday took my father from my arms, where I was holding him in a chair. It was necessary; he could not stand alone; and his power of speech was greatly impaired. Mr. Niday wished him to sign a paper. I did not know what the paper was. I allowed Mr. Niday to take my

father from my arms. He took him and walked him up and down the floor, talked very loud, and forcibly took him, trying to arouse him. My father could not be aroused. It was too late. And Mr. Niday thought he could be aroused to sign a paper. He could not. That is all I know of that. After the fall of 1914 I made contribution towards my father's support. I was led to believe by Mrs. Niday that my father was a pauper. Mrs. Niday asked me to give five dollars a month toward the support of the family, the care of father's household, of which Mrs. Wager was the head or caretaker. I gave five dollars a month for a period of about a year and a half. She advised me that my brothers were giving five dollars and that she and Mrs. Graef were giving twenty dollars apiece toward the support of the family. When I said Mr. Niday was attempting to get my father to execute an instrument my brother, John M. Green, and my aunt, Mrs. Wager, were present.

Q. Did you prior to the death of your father know anything concerning the execution of any deeds to the property formerly your home place known as Greenhurst, and more particularly two deeds which have been marked plaintiff's exhibits 1 and 2, which I now hand you?

A. I knew nothing of these things until my father's death. I first learned of their execution

immediately following my father's death. My brother Jim told me.

The mental condition of my father immediately prior to the 22nd day of December, 1914, and the first day of October, 1915, was one of absolute submission to another's will, absolute submission, with aggressive domination.

CROSS-EXAMINATION.

By MR. FRASER.

I lived at Greenhurst continuously until mother's death in 1909. I made that my home. During these years I never noticed anything peculiar about father or any mental deterioration during those years, until after my mother's death in the spring of 1909. When mother died that began the condition that I spoke of. I noticed this condition immediately after my mother's death, the same day. It came on immediately after the death of my mother, but very gradually. My brother, John Green, was at Greenhurst the day of my mother's death. I did not say anything to him about the condition of my father at that time. The first time that I spoke to my brother or sister in relation to this condition of my father I think was some time soon after we moved to Boise, in the year 1914. From 1909 until 1914 I had noticed this condition of my father's, but said nothing about it to my brothers and sisters until 1914. My father was living at North 6th street here in Boise at the time

I discussed the matter with him. I believe I talked with all of them more or less. In October or November, 1914, we discussed ways and means of bettering his condition mentally, making him happier. And my talk with Mrs. Niday was on the point of making it more pleasant and agreeable for my father while he was living there. While I was living at Greenhurst after the death of my mother I went to father for assistance in higher English. He was unable to help me as he had formerly done. I could not tell you what book on higher English I was studying out of at that time. I had a volume of short stories, the World's Greatest Short Stories, from which I was to be examined at a teachers' institute. I asked father to give me a review of these short stories and he was unable to do it. I think that was in 1914 in the summer time. Another incident which I recollect is that he would forget to bring things that he was asked to bring. He went downtown frequently and showed himself generally forgetful. I put that down as a sign of mental deterioration, because he had never manifested that before. He had always had a great capacity for detail. I was not in the habit at that time of studying the mental attitude or condition of mind of people I associated with or talked with. I do now. And when I speak of the condition of my father's mind I don't speak of that condition based on my knowledge of Christian Sci-

ence. I tried at one time to have father take up the treatment of Christian Science because all else failed him. Once in a while I gave him books to read upon that subject. He didn't read it to amount to anything. He could not. He read the book upside down. I guess he was able to read it upside down. He got some benefit. I stated in my evidence this morning, as one of the evidences of father's mental condition, that he felt very badly by reason of that fact that he wasn't able to support me better than he had. That statement was made in 1915. Prior to 1915, while I lived with father, I received all those things which I think were necessary for my welfare, and in 1915 was the first time he told me that he was financially unable to give me those things he would like to give me. I testified that I took walks with my father after my mother's death out over the farm and that we would walk quite a distance and father would not talk much. I absolutely consider that an indication of failing mental ability. I did not say anything about it to my brother John at that time. Everybody knew father's condition and could see it. In 1910 I was married. After that I lived three miles distant, but saw father frequently, used to visit back and forth. When I was married I left the old home . I did not tell John, my brother, to look after father, that he was mentally unsound and unable to take care of himself. I did not tell him

that at any time. I had sufficient trust in my brothers and sisters that they were interested in doing their level best, as I was. It wouldn't be necessary at any time to tell my brothers and sisters to look after my father. They were taking the very best care of him as they knew how on the ranch. After father came to Boise my aunt, Carrie Wager, took care of him. My brothers and sisters were always in and out of the home. Mr. and Mrs. Niday purported to support him and, of course, I understood that they were taking care of him financially.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

Q. In order that the record may be clear, Mrs. Acuff, you suggested to counsel that you did not mean, in your direct examination, that the one act of being unable to support you was evidence of insanity. Do you recall in what way you used that reference, in your father's inability to take care of you?

The fact that my father was unable to support me caused him intense worry and unhappiness on his part. Ordinarily if he had been normal mentally he would never have taken such a stand. He was miserable, unhappy, and disturbed.

GEORGE H. MOORE, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

At the present time I am engaged in the credit and commission business, located at Nampa, Idaho. In the spring of 1915 I was treasurer of the Nampa & Meridian Irrigation District and operating a little farm. During this period of time I was acquainted with Mr. R. E. Green. In November of 1914 I received a personal call from Mr. R. E. Green at my office. He called to see me and apologize for a letter which he had signed and sent to me. He said he did not write the letter, that he had signed it under duress, and he wanted to apologize for it. He said Mr. Niday had written the letter and that he had signed it under protest, said he thought I knew him sufficiently well to know that he would not write a letter of that kind.

Letter introduced in evidence and reads as follows:

On the letter-head of "J. L. Niday, Attorney-at law":

"Boise, Idaho, March 8, 1915.

"Mr. G. A. Remington, Secretary, Nampa & Meridian Irrigation District, Meridian, Idaho.

"Dear Sir:

"Answering your letter of the 4th inst., relative to the 35-acre tract of stored water, it has been my intention to use the water on the southeast quarter of the northwest quarter and lots 2 and 3, and all

that part of lot 4 lying north and east of the right-of-way of the Oregon Short Line Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa & Meridian Irrigation District, all in Section 31, township 3 north, range 1 west, and a small tract adjoining, making 212 acres, when the time came for its application to the lands, but inasmuch as this water will not need to be applied until some time in August, I prefer at this time to leave it open. It can not in any event be made appurtenant to the land until applied, and when ready for application I will direct you advisedly concerning the matter.

"Very truly yours, R. E. GREEN."

I am familiar with the values of farm property in and around the neighborhood of Nampa. Have lived in Nampa for twenty years. I am familiar with the property known as Greenhurst, formerly belonging to R. E. Green, deceased. I was familiar with the property in 1915. I would say that the market value of the 212 acres known as Greenhurst in the fall of 1915 was $25,000.00. I was acquainted with Mr. Green prior to the time of his visit to my office of which I have spoken, in a general and in a business way. In the fall of 1914, on the occasion of his visit, I noticed that he was physically and mentally sick and remarked to

some of the boys in the bank as he went out and called attention to his condition.

CROSS-EXAMINATION.

By MR. FRASER.

I have not got the letter that Mr. Green came in to see me about and apologize for. I left it in the files of the office. It had reference to the appropriation of water to the lands owned. It was a business letter. The letter was abusive, and he told me it was written by Mr. Niday and that he had just signed it. He apologized and said he had no desire to hurt my feelings. I didn't take that as an indication of mental weakness, the fact that he came there to apologize in regard to that letter. It was at that time that I noticed his failing mental condition. I also noticed the hesitating way in which he brought the matter up and the feeble way he presented it. He was physically feeble, an old man at that time. I can't tell just when I saw him before that time. I saw him often as long as he lived in Nampa, but since his removal to Boise I had not seen him so often. He had been in a few days before, however, and had transacted some business in connection with the office. He did not seem able to transact his business as he had in years before. He was able to tell me what he wanted and what he desired. There were no foolish questions asked. The fact that he was desiring to have his water changed from land to which

it was appurtenant to land to which it was not appurtenant, and changes which I was not legally in position to make, was the fact by which I arrived at the conclusion that he was mentally unsound; that and the way he presented his arguments, and the way he conducted himself, not so much what he said as the way he said it, the hesitating way in which he approached me and brought the subject up in the first place. I am acquainted with this 212 acres of Greenhurst ranch. I should say there is little more than a hundred acres cultivated now. Some of it is not cultivated. Some of it is not cultivated this year that was cultivated two or three years ago. It is hard to irrigate. There is in the neighborhood of eighty to a hundred acres of this land that is in sagebrush at the present time and has never been cultivated. I would not say that there are no alkali streaks on the hundred acres which are cultivated. The land which is not cultivated I would estimate it from fifty to a hundred dollars an acre. The land which is cultivated would be worth $250.00 an acre in 1915. I don't recall of any lands in that vicinity that were sold in the year 1915 for $250.00 an acre. There has been an increase in the value of lands between 1915 and 1918 in that vicinity. I would value the land in May, 1918, at $30,000.00 or better. The decided increase in the value of land has taken place within the last two or three years. There has been a

decided increase in the value of farm lands in the last two or three years. An increase of from fifty to one hundred per cent. It depends on the location and water right, etc. I am familiar with the other part of Greenhurst ranch that is across the road and not included in this two hundred acres, land in section 36. Part of this land is exactly of the same nature as the Greenhurst ranch. As a rule I would rather have the other land than Greenhurst, exclusive of improvements, you understand. I think the land in section 36 will go to alkali quicker than the Greenhurst ranch. Eventually I think they both will become bad by water coming down and alkali coming up. I take that into consideration when I fix the value at $25,000.

Q. Do you think a purchaser would pay $25,000.00 for it with that condition facing him in the future?

A. He would be in the nature of a sucker, but they do it.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

The land described in paragraph 8 of the complaint is the property concerning which I have testified to as to value.

PLAINTIFF'S EXHIBIT No. 7 offered and admitted in evidence, being a certified copy of a deed from J. L. Niday and wife, bearing date December 14, 1918, to A. L. Green and George

A. Buell, showing consideration for the transfer the sum of $30,000.00.

JOHN M. GREEN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the heirs-at-law of R. E. Green. That letter bearing date June 3, 1918, was written by me. From September, 1909, to March, 1917, the time of the death of my father, I was generally familiar with his physical and mental condition. I made no detailed study of his mental condition. I had no talk with Mr. Niday with reference to the nature of Mr. Niday's relation to the property which my father is alleged to have deeded to him. I understood we turned everything to Mr. Niday's hands to save the ranch. I had a talk with my father after he was sick in the hospital, after 1917. I asked him whether he had faith in Niday and he said he had. I noticed he was running down quite fast. He expressed himself in one conversation with me and said, "O God, what have I done?" He never expressed himself as living in fear of Mr. Niday.

Q. Now, Mr. Green, in order to be perfectly fair, I will ask you if you will please read carefully the letter to which I direct your attention (handing paper to witness)?

A. I wrote that. I was mistaken in the statements contained in the letter.

MR. MONTGOMERY: If the Court please, in view of the statement of the witness, who, I appreciate, is my witness, I desire to invoke the aid of the provisions of the statutes of this state allowing the introduction of declarations made contrary to the declarations made upon the witness stand, and now offer the letter in question for that purpose, not a basis of impeachment, but as showing a contradictory statement.

MR. FRASER: I object to it for the reason that they can not impeach their own witness, and it has that force and effect, if anything, and it is not competent for any purpose.

THE COURT: It may be offered for the purpose of impeachment, but not for any other purpose, that is impeachment by showing that he made contradictory statements. It would simply neutralize his present statement.

Said letter marked

PLAINTIFF'S EXHIBIT NO. 8,

admitted in evidence.

Letter dated June 3, 1918, addressed to Mr. J. A. Graef, Portland, Oregon:

"Dear Joe:

"I have never talked with Niday about the ranch, but have always understood that property was held by him in trust and if could be sold above

the mortgage and expenses the balance would be shared equally among children. I understood the deed made to protect property from litigation, in other words, to gain more time to clear indebtedness. Services rendered by Niday were free gratis, as I have heard him remark. Father was always grateful to Niday, but as for giving his children's inheritance to him there must have been undue influence. My father in his last days was afraid of Niday and worried to death over something that had happened. I took care of him during the last two months of his illness and often he would exclaim, "My God, what have I done.' He was sick and ailing over a year and at times completely out of his mind, and at any time during the last eighteen months preceding his death I would not consider him responsible for anything he might do. He was forgetful, absent-minded and not physically able to attend to business. The Dewey mortgage was taken up by Niday, as Jim stated to you, and if the children could raise money the ranch would be turned over to them. I will certainly be with you if lawsuit is necessary, but I have thought Niday would do the square thing. Father and mother had confidence in him. Niday never stated to me or others in my presence that the property was to secure him for money advanced. Gratia and Philo went to see Niday after the funeral, and if you have not written them, would be wise to do

so. Now, Joe, it is very kind of you to take this step and offer to bear expenses if no recovery. It is no more than right that you should be repaid if suit is won. Thanking you for all favors and with love to Jule and children, I remain, Yours truly,

JACK."

That is my letter all right. The letter is true.

CROSS-EXAMINATION.

By MR. FRASER.

This letter that has just been read to me refers to a period of time after my father's sickness in the hospital. I think he was sick about eighteen months. In 1916, about two weeks before he was taken to the hospital, I was up at the house and had a talk with him. I did not think therewas anything mentally wrong with him at that time. When he went to the hospital they told me he had pneumonia. It was after he went to the hospital that he said, "O my God, what have I done." I do not know what he had reference to when he made the statement. I do not know whether he meant that he had given his property away or sold it or whether he was in debt.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

When I said in the letter that father was always grateful to Niday, but as for giving his children's inheritance to him there must have been undue influence, it must have been before he got in the

hospital, about two weeks before. I thought maybe Mr. Niday had persuaded him to turn over the ranch to him. When I said in that letter, "My father in his last days was afraid of Niday and worried to death over something that had happened," he did not tell me what it was. I got the impression from talking with father that Mr. Niday took over the ranch to save the ranch.

RE-CROSS EXAMINATION.

By MR. FRASER.

I did not have any knowledge of my own of this transaction between my father and Mr. Niday. I had no knowledge as to whether or not Mr. Niday paid anything for it, no knowledge on the subject at all.

JOHN CLARK, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By. MR. MONTGOMERY.

My name is John Clark. I am engaged in farming. During the year 1916 I rented the property known as Greenhurst from Mr. Niday. I gave him one-third of the wheat. The rest was pasture land. And I gave him half of what I collected off the pasture. It amounted to one thousand to twelve hundred dollars somewhere that he received.

CROSS-EXAMINATION.

By MR. FRASER.

I did not pay the taxes or the water rent.

JOHN LEASH, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am engaged in farming. During the year 1915 I rented the property known as Greenhurst from Mr. Niday. It is what you call the old ranch, the Greenhurst ranch, consisting of three hundred acres and better, and I gave cash rent of $1910.00. I had a lease of one year, with the refusal for three years. I would not put myself up as an expert on the value of lands. I judge the value of land from what it will produce and what I make off of it. I was on the place one year. I first took notice of the sales of land in that vicinity in the summer of 1916. In a general way I had some knowledge prior to that, but not in that immediate vicinity. I don't know of any being sold during the time I was there. For a general purpose farm I consider it one of the best in the valley, that is, growing crops and stock feeding. In my opinion the value of the Greenhurst ranch, 212 acres, in the fall of 1915, would be about $125.00 an acre.

CROSS-EXAMINATION.

By MR. FRASER.

That is the 212 acres on the east side of the road. There is about 150 acres of it under cultivation, blue grass and cultivation. There was some of the land not under cultivation I considered the most valuable part of it. There is a few acres that can not be excelled in the state as a feeding ground, lava rock bottom. There is a corral and feed racks and so on. The other that is not in cultivation, the creek runs all the way through it. A fine place for stock and cattle, running water, and there is only about fifteen acres that can not be farmed. I leased it in 1915 and paid $1910 for the whole farm. That $1900 that I paid in rent included one hundred and eight acres on the west side of the road. I paid $1110 rent for what is now known as the Greenhurst. I do not know of any land being sold over there in 1915 at $125.00 an acre. I lived in that neighborhood one year. On the lower side of this hundred acres there is three or four acres alkalied. That is all I noticed.

CARRIE WAGER. produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Carrie Wager. I reside at the present time in Portland. After the year 1909 I resid-

ed in Idaho at Greenhurst ranch. I came to Idaho on a visit to my mother and Mr. Green's family. My mother was Mr. Green's mother-in-law. I remained there from the last of May until the last of November, 1913, when I went to Ohio. I came back in 1914 to Boise. I received a telegram from Mr. Niday. In response to this telegram I immediately got ready to take the journey and arrived on the 21st of November, 1914, at Nampa, and saw Mr. Green at that time and conversed with him just a few moments. I went into the dining-room where he was eating and went up to him and he looked at me, a kind of strange look, and he did not know me just the moment I spoke to him, and then he said, "Why, this is Carrie," and he shook hands with me and kissed me and was glad to see me. I had known Mr. Green ever since I was twelve years old. I noticed his condition and I should say he was depressed and seemed to be crushed. In the fall of 1914, after I arrived in Nampa, I went to live in Boise, 1620 North Sixth street. I kept house for my mother and Mr. R. E. Green. When I first went there I had charge of the home, to take care of it. During this period of time I saw Mr. Green constantly. I continued to remain there up to the 16th day of March, 1917. Mr. Green passed away and I left the place the following week. During the period of my residence in Boise from the fall of 1914 until Mr. Green's

death I made observations with reference to his general physical and mental condition. In the first place he seemed to be so nervous. He would pace the floor and wring his hands and he would follow me wherever I would go and watch for me, and he would go down the street and he would come back and say, "Well, Carrie, I got lost again," and I said, "Mr. Green, you have lived here so long in the city don't you know where you live yet?" "Well," he says, "I got lost. I got off at the wrong street and got lost." He would sit and figure and write figures and then he would tear it all up and put it in the stove. I did not carry on any conversation with him regarding his business affairs. You could not approach him in his business. I never did. During that period of time I noticed a change in Mr. Green from former years. Mr. Green was a very sociable man and he liked to have company, but after we went to Boise he would just sit and never say anything to any of us. He was a great card player and we used to play cards there, but after we went to Boise he never played cards but once, and then he didn't know the cards one from the other, so we didn't play any more. I was present on an occasion when Mr. J. L. Niday attempted to procure the signature of Mr. Green to a document. It was the 7th day of March that Mr. Green became unconscious, you might say. He didn't know. And we sent for Mr. Niday, and he

came up, and he said, would he be able to ever sign his signature, would he ever be able to get his signature. But we tried to walk him around. He wanted us to walk him around and try to arouse him, but he wouldnt' arouse. In the fall of 1915, along the latter part of the summer, and all after that, he would just wring his hands and say, "Oh, Carrie, I have ruined my family, I have ruined my family."

CROSS-EXAMINATION.

By MR. FRASER.

I did not understand what he meant by that statement; I never questioned him. When he made that statement I thought it might be in reference to the fact that his property was so involved that he had nothing left and that was what caused him to say that. After 1914 he would come home sometimes and tell me that he had got lost again. Mr. Green was eighty years old at that time. My mother was living with us at that time. I never knew of the two of them getting lost but once. The two were together and it was dark and they got off the wrong side of the street car and both got lost. The time we tried to get his signature was just a few days before his death. I do not know Mr. Satterfield personally. I know he was in town in Boise here at that time. I do not know whether or not the signature of Mr. Green required at that time

was in connection with some of Mr. Satterfield's affairs.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

Mrs. Niday said Mr. Satterfield would like to see Mr. Green and she told him he wouldn't know him, there would be no satisfaction in meeting him.

RE-CROSS EXAMINATION.

By MR. FRASER.

I say the time Mr. Satterfield wanted to see him was along close to the time they wanted to get his signature to a document, a few days after that.

HATTIE A. PHILLIPS, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Hattie A. Phillips. I was acquainted with Mr. R. E. Green in his lifetime. I first met him in 1915. He was my neighbor, lived just a block from me. He was my neighbor up to the time he died. During this time I saw him every day when I was home. I made observations in regard to his mental and physical condition. He acted queer and nervous and restless at all times. I carried on conversations with Mr. Green during that time. They were not in relation to his business. He didn't seem to be clear in his—He would start a conversation and then he would stop right in the

middle of a conversation. He didn't seem to be able to finish it, know what he was talking about. He knew, but wasn't able to finish. And Mrs. Wager used to visit my house every day. She wouldn't be there five minutes until Mr. Green would come down and ask childish, foolish questions, ask her when she was coming home, and was she going to stay long, and whether he should go here or there. He depended entirely upon her. I have seen Mr. Green in the presence of Mrs. Niday. He seemed to be afraid of Mrs. Niday and nervous. Whenever he knew she was coming he would pace the floor and wring his hands and at all times he seemed to be in fear of her. I lived at their house from April, 1916, till the 17th of December. I was there off and on and made it my home.

CROSS-EXAMINATION.

By MR. FRASER.

I did not see Mr. Green in 1917. I went to visit my daughter in Pocatello the 17th day of December, came back the 20th day of March, and Mr. Green had passed away. I talked with Mr. Green frequently. He would be sitting in his chair. I would ask him questions and talk to him and he would start to reply and just become nervous, begin to shake and wring his hands, didn't seem to know how to finish. That was the condition in 1916 and 1915. I didn't notice very much change in him. I was there frequently when Mr. Niday would call

on him, which was on an average of once or twice a week. Mrs. Niday would call on him almost every day. He went down to visit Mr. and Mrs. Niday frequently. He seemed to be afraid to go to their home. When he was told they were coming after him to take him down or that he had to go down there he would just begin and walk the floor, wring his hands, act so nervous and worked-up; he didn't want to go. He never refused to go. They would take him in the automobile. Sometimes he went on the street car. Sometimes he went by himself. He was not afraid those times. He didn't seem to want to go. They would call up and I would hear the conversation over the phone. He would ask Aunt Carrie if it was time to go and should he go. He would go downtown, would start off and go downtown, come back and say he was lost, didn't know where he was, forgot which way to go to the car line.

MARGARET R. EGBERT, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I reside at Nampa. Have lived there twenty years. Mr. R. E. Green was my brother-in-law. His wife was my sister. Following the death of my sister Mr. Green seemed crushed and broken, absent-minded, and uninterested in things. After

Mr. Green removed to Boise in the fall of 1914 I saw him possibly every two weeks. My mother lived there and I came over to visit them. During the years 1914 and '15 I had a talk with Mr. Green and he seemed so worried and crushed and I asked him what was the matter, and he said he was up against it, he didn't know where to turn, and I advised him to go to Mr. Niday. During 1915 I discussed with Mr. Niday Mr. Green's indebtedness and he said he couldn't understand Mr. Green, he was becoming so involved. During 1914 and 1915 Mr. Green failed right along. Every time I would make a visit to Boise I could see he was a failure and he realized his condition. There was a letter came from my sister, expressing her sympathy for Mr. Green, and I was reading it to my mother, I did not know he was hearing me, and he said, "Oh my, have you written anybody about my condition? It is bad enough to bear without anybody hearing of it." And we told him it was only his sickness we were referring to. One day Mr. Green was quite excited and I asked him what was the matter, and he said, "I have just written the meanest letter I have ever written," and he said, "It was to Harvey Moore," and I said, "What did you do that for," and he said Mr. Niday dictated the letter and he had to sign it.

CROSS-EXAMINATION.

By MR. FRASER.

I think Mr. Green worried about his financial condition. I think his financial condition brought on the failure of his mind. He certainly realized that he was badly involved financially. He told me he didn't see how he could save Greenhurst, that everything was gone. He worried over those matters.

J. C. DEAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is J. C. Dean. I reside at Nampa. Have lived there since the fall of 1916. I rent from Mr. Niday the ranch known as Greenhurst, 212 acres known as the Greenhurst ranch, where the buildings are, and 111 acres across the road. I rented this land for the year 1917 and '18. I rented it from Mr. Niday on a 50-50 basis. Mr. Niday's share in 1917 was something like $1400 and in 1918 it was eighteen or nineteen hundred.

CROSS-EXAMINATION.

By MR. FRASER.

I did not pay the taxes on the property or the the water rates. Mr. Niday furnished the seed and furnished everything. I did the work. Mr. Niday

furnished the grass seed and wheat and the water, taxes, and all repairs.

H. G. PATTERSON, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is H. G. Patterson. I have resided in Boise nearly twenty-one years. Am a dentist. I was acquainted with R. E. Green during his life-time. Knew him for a period of about thirteen years. I had an opportunity to observe Mr. Green's mental and physical condition during the years 1914 and 1915. Mr. Green was at my house and I was at his home. Sometimes it would be twice in a week and sometimes it might have been two or three weeks without being there. I believe about the first that I noticed was shortly after he had moved up to Boise. I noticed that he was not as I had noticed him before he came to Boise, and while he was on the ranch. He was not so talkative and seemed to sit around more, and either be thinking or didn't seem to talk very much. I remarked to my wife several times that I believed he was failing. He kept failing from time to time as I would see him until the time of his death. It was so noticeable to me that I made the remark to the wife; nearly every time we would see him I would say that Mr. Green is failing.

CROSS-EXAMINATION.

By MR. FRASER.

He was failing physically and mentally. I base my opinion that he was failing mentally upon his actions, sitting and not conversing. When I would be there he would speak to me, and if I would sit and talk a little bit he would talk, but he would sit quiet, talking and sitting. The other indications which I noticed of his failing condition was he would get up and go from the room where he was and I would hear Mrs. Wager say, "Mr. Green, what are you looking for, what is the matter?" He would say, "I don't know." Then he would come back in where I was. The first time I noticed this I think was in the fall of 1914. Mr. Green was an elderly man at this time. I think I have seen other men of his age show the same indications that he did, of old age and senility, to just as great an extent as Mr. Green disclosed them. Some men of his age act very much as he has and some do not. Mr. Green, in other words, appeared to be an old an feeble man.

MRS. N. A. RATCLIFF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Mrs. N. A. Ratcliff. I reside in Nampa. Have resided there thirty years. During

my residence at Nampa I was acquainted with Mr. R. E. Green, deceased, very well acquainted, so much so that I would feel at liberty to go to their home and mingle with them at their family table just as I would with my family. I had an opportunity in the years 1914 and 1915 to observe Mr. Green's mental and physical condition. Before Mr. Green left Nampa we knew his mind was not as it had been. When I would meet him on the streets he never recognized me until I would speak, and I have spoken to him the second time and started a conversation before he would know who I was. That was before he left Nampa. That was very much in opposition to his general mental temperament in earlier life. After he moved to Boise in 1914 I visited at his home and stayed overnight at different times. I would notice that he was failing. During the years 1914 and 1915 I made visits perhaps two or three times a year. At these times one of the strongest impressions was that he could not carry on a conversation. He would forget what he was going to say. He would start up to say something, a sentence or two. Then he would quit, and get up and go from room to room. Formerly he was a man that would carry on a very lengthy conversation, he was always jovial, and speak of what was going on. The last I remember specially of, and the greatest, was the year that our soldier boys left for the war, 1917 or 1916. It was the

4th of July and I went there and stayed all night. There was quite a change since I had seen him before, he was so very nervous, he could could not be still, and he would follow Mrs. Wager from room to room and try to carry on a conversation and tell her something, but he wasn't able to do it.

CROSS-EXAMINATION.

By MR. FRASER.

I was on the streets in Nampa at least once a week and if I met him he never recognized me, that is, within the last year before he moved to Boise. As I remember, he always did before. I did not see Mr. Green for some time after his illness in the hospital. I noticed quite a change in him after his illness and he failed rather fast after his illness, but he had failed for some time before he left Nampa. I suppose I have seen those changes in some people, but not people that was of normal mind. They would fail in age and become forgetful. I think a great many men and women become forgetful in their old age. His case was unusual as he could not recollect anything after the time he began to fail. It wasn't only forgetting. He would go from room to room and follow Mrs. Wager and try to ask questions and he couldn't complete the sentence. I do not know whether he followed anyone around when he was over at Nampa and before he moved to Boise. I saw him about twice a year after that.

J. A. GRAEF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am the husband of Julia Graef, the plaintiff in this case. I conducted the negotiations which were had on behalf of Mrs. Graef with reference to the purchase of the claims of Gratia Green Acuff and Philo F. Green. In November, 1919, I received a letter from Mr. Philo Green, stating he was short of money, and he would rather sell his interest in the case if he knew of anyone who would buy it, he would rather settle with Mr. Niday as Mr. Niday had offered to settle with him before by a written proposition. I told him I would consider the matter and I would come through there and talk the matter over. I called upon Mrs. Gratia Acuff and told her what Mr. Philo Green stated, what he wanted. At the same time Mrs. Acuff said she would rather sell her claim, too, and just off-hand I said, "All right, I kill take it for my wife," and I paid her immediately, wrote out a check as part payment of the agreement. The following day or two I visited with Philo Green and he broached the subject and I made the same proposition. I made the same part payment to him. As I had not sufficient funds with me at the time I made this payment to the statement here. Plaintiff's Exhibits

5 and 6 are the receipts issued at the time of these negotiations.

CROSS-EXAMINATION.

By MR. FRASER.

I have had the direct control of this litigation since its commencement, for my wife. I had control of it when it was started in the district court of Canyon County, from that time to the present time. This two hundred dollars was not the full consideration for their claims. I have not as yet paid the balance of the consideration. It is not contingent upon the result of this litigation. I went down there and obligated myself to pay Mr. Philo Green and Mrs. Acuff the sum of $3,000.00. After I purchased these claims I returned to Portland and told Mr. Montgomery what I had done. Prior to that Mr. Montgomery did not know anything about it. Mr. Montgomery then advised me to dismiss the suit. He did not give me any reason. Just told me to dismiss in the state court and commence one in this Court, and I followed his advice. I really know of no reason for dismissing the action in the state court. The only reason was the case was to be tried in Caldwell, the County where the property lay. Mr. Niday applied for a change of venue and the change of venue was granted, and it was to be tried in Boise here. I wanted it tried in Caldwell. I could not say what reason Mr. Niday would have for wanting to have it transferred to Boise. I

did not commence the negotiations to purchase these claims. I am to pay them $1,300.00 more apiece. I probably could have paid them the whole amount in cash at that time if I wanted to.

RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

I purchased these claims on behalf of my wife. I had no interest in the litigation.

PHILO F. GREEN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the heirs-at-law of Mr. R. E. Green, deceased. Plaintiff's Exhibit No. 5 is a receipt issued by me to Mr. Graef. I have heard the testimony of Mr. Graef with reference to the transaction that took place between Mr. Graef and myself. I wrote to Mr. Graef in regard to needing some money and I received a reply from Mr. Graef, and he said he would see me at a future date, and he came to Jerome to see me. I would say it was a couple of months after I sent him the letter. Mr. Graef's statement of the contract between us is correct. I did not prior to the death of my father learn of the execution of the deeds given by my father to Mr. J. L. Niday.

CROSS EXAMINATION.

By MR. FRASER.

Mr. Graef came to the office to see me. He knew what circumstances I was in and he gave me $200.00 on account of my claim. He did not tell me he wanted to buy it. I told him first that I wanted to sell it before he mentioned it to me.

THE PLAINTIFF RESTS.

J. L. NIDAY, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is J. L. Niday. I am one of the defendants in this action. I am the son-in-law of R. E. Green, deceased. My wife's name is Mollie A. Niday. I first became acquainted with Mr. Green in Boise about 1893 or '94. I knew him from that time until his death. He resided during this period of time in Boise and on a farm near Nampa, about seventeen or eighteen miles away. I have resided in Boise during all this period of time, engagd in practicing law. When I first know Mr. Green he was manager of the Ridenbaugh Canal and looking after the business of Satterfield and Taylor. They owned what was then the Boise City Irrigation, Land and Lumber Company, a large amount of land in Ada and Canyon counties, consisting of several thousand acres. Mr. Green managed the

Ridenbaugh canal, looked after the land of Taylor and Satterfield until about 1906 I think, when the canal was conveyed to the Nampa & Meridian Irrigation District. In the meantime both Taylor and Satterfield had died and Mr. Green had been appointed administrator of those two estates, and from that time on he spent most of his time in taking care of those, except when he was on the ranch looking after ranch matters. The matters Mr. Green looked after involved a considerable sum of money. Mr. Green was a good business man, a fine business man. He was highly educated. He was always alert, a man who devoted himself strictly to his business; was a great reader, a great buyer of magazines. He seldom let one pass that he did not purchase. He was quite a lover of art and had I think rather rare judgment in that line. He was by profession a civil engineer. Mr. Green during his residence in Idaho acquired a considerable amount of lands. They were situated mainly, if not entirely, in Canyon County. He acquired those lands probably along about 1898 or '99. He owned them from that time up to October 1, 1915. From the time I knew Mr. Green until 1909 I was practically in contact with him all the time during business hours. Our offices were right side by side. About 1900, or somewhere along about that time, he moved to Nampa, from that time on I did not see him so very often. I would

see him after he moved to Nampa probably once a week. He visited my home in Boise frequently, both he and Mrs. Green, after they moved to Nampa. After the death of Mrs. Green in 1909 I would probably see Mr. Green once or twice a week. After the death of Mrs. Green Mr. Green undoubtedly suffered physically, as any of the family naturally would, but mentally I noticed no difference in Mr. Green's mind from that time until the time he was sick in the early days of January, 1916. At that time he had what the doctor called every indication of pneumonia. That was in January, 1916. From that time there was a change in his mental condition, brought about by that sickness unquestionably. It was not serious only while he was sick, but after he had in a way recovered from that. There were times undoubtedly that he was excitable and showed every indication of being poisoned with autotoxic poisoning or something of that sort, bad digestion. He showed nervousness. I do not think there was any lapse of his memory. I do not thing he was a man that would lose his memory more than would be expected in any man of his age. I talked to Mr. Green almost daily from 1916 to the time of his death. I had not the least difficulty in carrying on a conversation with him. He certainly understood everything that was said by me. Not only that, but he could argue out a point and do it as well as anyone could, and that was

even after his sickness. In 1914 I was acquainted with the lands Mr. Green owned at that time. I was familiar with Mr. Green's affairs at that time, in 1914. I think all of his property was encumbered, every bit of it, as I recall it. Greenhurst proper—when I speak of Greenhurst proper, I refer to the land in controversy in this action—Greenhurst proper had on it at this time a mortgage to Mr. Dewey of $10,000.00 and accumulated interest. It had a second mortgage on the same property of $1683.55, also in favor of Mr. Dewey. And at that time Mr. Green came over from Nampa to consult me. At the time he came over to consult me was possibly in July, but, if not, it was in September following, in 1914. I desire to state in a general way what became of all the property owned by Mr. Green. There was on the Dewey mortgage $11,683.55 and accumulated interest and on the Volkmer mortgage there was when paid $4,859.50, and on the Mullen mortgage when paid $2,385.12, on the Hardiman mortgage $3,292.00, and in addition to this he owed the First National Bank of Idaho on one note $5,000.00 and accumulated interest and taxes amounting to $5,612.20, and on unsecured notes with interest $3,776.00, and on the Lewis mortgages, two of them, which had been given for unpaid labor accounts, $3,461.96, and on the Templeton mortgage a total of $3,000.00 and accumulated interest. I may say this totals upwards of $40,000.00,

including the floating indebtedness he had at Nampa, as Mr. Green and I figured it up at that time. These matters were settled and adjusted in the following manner: Mr. Volkner had already instituted foreclosure proceedings. The First National Bank of Idaho had a lot of unsecured debts and the question came up as to what was going to be done with this property, and we called some of the creditors in, Mr. Green and I did, and discussed the matter together, and Mr. Green was of the opinion that there was absolutely nothing that he could do. It became necessary for the bank either to lose a large part of its indebtedness or to take up the other debts. We were at that time going to attempt to save what we called Greenhurst proper. The First National Bank agreed to take up all of these outstanding mortgages on everything else. This meeting that I speak of was in November, 1914, and as the matter was figured up, it would take something like $19,000.00 to be raised to cover the other properties outside of Greenhurst proper. The $19,000.00 was then secured to the First National Bank as follows: The 108 acres situated in Section 36, the 65 acres known as the Hastriter place, and the 80 acres known as the Ward place, were all deeded to Mr. Moore in payment of his debt. Mr. Moore furnished the money to pay off the mortgages on these lands and then he took a deed outright to the property, to the lands I have mentioned,

and that divested Mr. Green of title to those particular lands. Mr. Green made arrangements with Mr. Moore, who did not want the property at the time, that he might redeem it at any time within a year, and it was put in the contract, and Mr. Moore, acting on behalf of the bank, let it run another year still, giving Mr. Green an opportunity to redeem those lands for the amount due, and even suggested that he would knock off something. And then he did not do anything, even after that year had expired, until the spring of 1917, when I told Mr. Moore that I did not see any chance for Mr. Green to handle them and I would not ask him to wait any longer on him to do so. During those two years I tried to find a buyer for those lands so as to save any equity in them for Mr. Green. I was not able to find a purchaser for them. I have a copy of the agreement between Mr. Moore and Mr. Green. There were about 253 acres of land included in this Moore deal that were deeded to Mr. Moore in satisfaction of the debts against said lands. This still left Mr. Green a considerable number of acres of land, the 212 acres of Greenhurst, 40 acres on the south side of the O. S. L. R. R., and also city lots in Nampa with a house on them. After this deed had been given to Mr. Moore Mr. Green disposed of his other real estate. He conveyed to Mr. Charles Lewis those lots, with the house situated thereon, in what is known as Elm-

wood place, I believe, an addition to Nampa. The consideration was practically $3,461.96. That was not paid to Mr. Green in cash. This was the amount that Mr. Green owed Mr. Lewis and he deeded him these lots in Elmwood place in payment of that indebtedness. Mr. Green did not receive a cent of money at that time. It just went to pay one of his debts. Mr. J. H. Templeton had two mortgages on forty acres or thereabouts lying south of the Oregon Short Line Railway Company in Section 36, 3, 2 W., and a settlement was made with Mr. Templeton whereby his two mortgages were paid by deeding that property to him without any consideration at all coming to Mr. Green other than the payment of the debt. The only other land left after these deeds had been executed by Mr. Green was the 212 acres known as Greenhurst, in Section 31. That was encumbered. That is the land in controversy in this action. Mr. Dewey held the mortgages on that land. About a year after these other transactions Mr. Green was in the office and he brought up the question about what was going to be done with Greenhurst and the payment of the mortgage which would come due the following January, and in the conversation he said, "Niday, you have been transacting the business of mine and my family here practically ever since you have been here and you have never been paid anything, and I would like for you to have Greenhurst

if you want it. I can't pay out on it, and it is of doubtful value even for you," and he expressed a doubt as to whether or not I should take it in view of the fact that he knew it was a losing proposition. I told him that I would consider the matter. Later on he came in and the matter came up again and I told him that I thought I could see my way clear to handle it and I hated to see it go for that amount of money, even though it was losing; that I hoped some time the conditions would change in real estate, and Mr. Green had to be supported, and some time maybe conditions would change so there could be something gotten out of it. I told him I would accept the deed; prepared the deed for him, subject to the mortgages that were against it; and he took the deed himself and went away to Miss Nellie Wood, and he had it acknowledged, and later brought it back to me. I did not induce or persuade him to sell or transfer this tract of land to me. I never approached him or asked him to deed that land to me. The proposition came from him absolutely. I had never considered the matter before he mentioned it; in fact, I didn't want Greenhurst place, never did want it. When it was offered to be conveyed to me I hesitated seriously before I would take it. There are about 105 acres actually in cultivation, about 40 acres in sagebrush. There is a tract south of the lane and the house, between them and the railroad, of about 70

acres, of which about 15 is in a proper state of cultivation. The balance is practically not in cultivation, though it has been cleared and is in a way irrigated, but it is so steep that it is almost impossible to irrigate it. It is ashy soil that dries out so quickly that you can't keep it wet long enough to produce anything. One hundred and five acres is practically all that is producing now. The 105 acres would be fine land were it not in danger of becoming alkalied and what they call water-logged. The water table is rising there and Greenhurst is threatened unquestionably, and seriously threatened. I have a tract of land lying about half a mile right down the creek from there that a few years ago there wasn't a better piece of land found anywhere. Today the land is so badly alkalied and the water level is so high in it that you don't dare to run anything heavy over it, like a threshing machine, because it will mire down, and it is getting so that it practically won't produce anything, and beyond question Greenhurst is threatened in the same way today. There are certainly indications of alkali on Greenhurst. There is alkali on the ranch itself, that is, on the cultivated part. There are numerous spots that are white even now, and as soon as the frost comes and freezing it will be a great deal worse. I paid these mortgages held by Mr. Dewey against Greenhurst. I paid him $12,178.44. I have been engaged in

farming for a good many years in Ada and Canyon counties. I own irrigated lands in both those counties. I have kept posted as to the market value of farm lands in these counties. I am well acquainted with the ranch known as Greenhurst. I was well acquainted with its market value in 1915. In my opinion the reasonable market value of Greenhurst ranch in 1915 was $15,000.00. That is more than it would show to be worth upon any known method of figuring out its productive value as it stands today or as it stood then. I do not know of any lands being sold around there in 1915 for more than that. The lands which were deeded to Mr. Moore or the best land that Mr. Green had, and the most valuable, was the land situated in Section 36, 108 acres lying across the road from what we call Greenhurst proper, and also the land conveyed to Templeton on the south side. The 108 acres across the road is the land that was conveyed to Mr. Moore. They are a great deal more valuable than the Greenhurst land, a great deal less waste, and greater productivity. From the time this land was deeded to Mr. Moore during 1915, '16, and somewhere along May or April, 1917, I tried to find a purchaser for it for Green for more than two years. I was not able to find a purchaser at all. The amount against this land was less than $74.00 per acre and I was unable to find a purchaser for it. The land which was deeded to Mr. Templeton was a

good deal better land than Greenhurst and that was deeded in satisfaction of a deed of $3,000.00 and interest. In 1915, after Mr. Green had executed this conveyance to me, he owned no property that I know of. He moved from Greenhurst in the early part of November, 1914. I would say that land situated around Greenhurst more than doubled in value between the year 1915 and the year 1918. No doubt the main reason for this was the war and the high price that farm products were bringing during the war. It gave an impetus to the valuation of real estate. I leased Greenhurst for the year 1916, '17, and '18, before I sold it. I have a statement of the expenses and income of the ranch during those years. The last year of Mr. Green's ownership of Greenhurst he leased the property to Mr. John Leash, that was in the year 1915, at a cash rental of $1110. For that year the taxes were $153,99, water toll and assessment $303.99, repairs and incidentals a hundred dollars. I have not figured anything for overseeing the place or for the wear and tear on the house and fences. This refers exclusively to the 212 acres of Greenhurst. The let loss that year, figuring interest on the amount of money that I had paid on the place at eight per cent., the total loss was $416.32. I mean the interest on the Dewey mortgage. For the year 1916 those premises were leased to John Clark and G. D. Fike on

a crop rental basis, for one-half the crop. The one-half crop rental for that year was $1,020.74. That is the amount that came to me as owner of the land. The taxes for 1916 were $142.84, the water taxes were $324.97, incidentals $18.70, and figuring one year's interest on the cost to me at eight per cent., $968.34, making a loss of $434.11, without figuring anything for overseeing or wear or tear. The next year was 1917. It was leased to J. C. Dean on a crop rental basis. I received that year for my share $1255.00. The expenses were taxes $185.78, water assessments $503.98, and painting the house $276.64. Figuring interest for one year on my investment at eight per cent., the loss was $678.74, without figuring anything for overseeing, wear, or tear. In 1918 the premises were again leased to Mr. J. C. Dean on a crop rental. My share of the total income was $1938.05. The expenses were taxes $231.62, water assessments $332.95, the incidentals were $16.25. Interest on the amount of money I had in it, that is, the amount of the face of the mortgage, and other expenses paid, amount to $968.34, making a total indebtedness or expense for that year of $1749.16, showing a gain of $188.89, without figuring anything for overseeing, wear or tear of the property. The deed to me from Mr. Green for the 206 acres was dated October 1, 1915. The second deed was for six acres and was dated December 22, 1914.

On these dates the mortgages to Mr. Dewey were existing liens against this property. They were to become due January 31, 1916, in about four months from the time I procured the deed. Mr. Dewey told Mr. Green when the mortgage had been renewed before that he must not ask for another renewal, it would have to be paid when due. Under date of January 7, 1916, Mr. Dewey wrote Mr. Green a letter, notifying him the date when the mortgages would become due. Mr. Green did not to my knowledge have any means or methed of raising the money to pay off these mortgages. He said he had none, and I knew of none. All his other property had been disposed of at this time, and I know of no other resources that he had by which he could have paid off this mortgage. At the time Mr. Green came to me and suggested that he would deed the property to me he said if I didn't take the property Mr. Dewey would have to take it. I heard Mrs. Acuff testify that a short time before Mr. Green's death I went up to the house when he was practically unconscious and that I took him out of her arms and compelled him to sign some document or paper. As I stated before, Mr. Green had been administrator of the will of the Taylor and Satterfield estates for a great many years and he had a little balance of account there. It is now my memory that it was seven or eight hundred dollars in cash in the First National Bank

of Idaho. Mr. Satterfield was here and knew that Mr. Green was in a very bad state of health and could live but a very short time. He asked me to have that cash checked to my account so that if anything happened to Mr. Green the money would not be tied up, and I went up to see Mr. Green. He was sitting at a table, as I remember, at the time, doing something on a board. I spoke to him and he looked up and spoke to me in a quiet, low tone. I said, "Mr. Green, how are you feeling today?" and he said, "I am feeling pretty well." I came up there with a check for him to sign for the money in the bank standing in the name of R. E. Green, administrator. I do not remember the details of presenting that check, only I know this, that Mr. Green was not taken out of anybody's arms. I know that he was not coerced in any way, shape, or form to sign that check or any other check, and I know that Mr. Jack Green was the one that presented him the check to sign. I think the check can be found today, showing it has no marks of being done under force or coercion. That is absolutely false. I heard read into the record here a letter written by Mr. Green to the irrigation company in regard to an application for water to this land. I think in the spring of 1915 there was a controversy arose over the amount of that water that belonged to the tract of land that was deeded to J. H. Templeton, and that letter that was re-

ferred to was one that I had written to Mr. Moore, treasurer of the Nampa-Meridian Irrigation District, that it was not his business to decide upon what water was appurtenant to land or what was not, that that was a matter of contract between Mr. Green and his purchaser, Mr. Templeton. I am referring now to the letter that Mr. Green apologized to Mr. Moore for. That letter was written after I became the owner of Greenhurst. The transaction was done that way for the reason that the district at that time had no knowledge that Mr. Green had conveyed the property to me and I was putting it in a way that they would comprehend it, as it had always been before. An application had been made by Mr. Green for this water prior to that time and all negotiations in regard to it had been in the name of Mr. Green. After Mr. Green came to Boise to reside in 1914 I saw him very frequently, almost daily. He visited at my home very frequently after that time and he kept visiting at my home as long as he was able. He never showed any signs of being afraid of me or my wife, nor did he seem reluctant to go with me when I would go up after him. He sought me a great deal, came to my office almost daily after he was sick, and if I was busy would wait in the office until he could see me. Instead of shunning or being afraid of me, I think the exact reverse is true, and the same is true in regard to my wife. To say

that he was afraid of her is a slander and a vile accusation. My wife was devoted to her father at all times. I advanced money to Mr. Green after 1914 when he had deeded his property away. It covered a period of time from about June, 1915, to the time of his death. I advanced to Mr. Green in that way the total sum of $2,808.77. It was used largely for living expenses, some little part of it for taxes, about $484.17 for interest to Mr. Dewey. Most of it, however, was living expense. He had no independent income, only a small amount from Taylor and Satterfield estates. When he left Nampa to come to Boise in the fall of 1914 his household goods and furniture were mostly moved over here. There were some things sold at public auction. In 1914 a deed was made to me by Mr. Green for the tract of land of about six acres. When Mr. Green first came over here we found his property tied up in mortgages and the Volkmer mortgage was being foreclosed, and in the settlement with Mr. Moore for the First National Bank I arranged to have six acres that was included in the Volkmer mortgages released from the lien of the mortgages. This six acres was not deeded to Mr. Moore. When it was released clear and free of incumbrances Mr. Green said to me, "Niday, I probably will need all of this and more too for my living expenses; I would like to deed you this six acres and you can put up money for my use," which was done in that way.

That is the way the six acres came to be deeded to me. That was all that Mr. Green had left at that time and he had other debts outstanding. There was considerable indebtedness to the Bank of Nampa. When the money was paid in on the public auction that was held when the farm machinery was sold there was something like $500 coming to Mr. Green. That money Mr. Green brought over with him to Boise. The deed given to me by Mr. Green to the 212 acres was placed on record I think about a year after I received it. It was put on record about a year before the death of Mr. Green. I had a reason for not putting it on record. In the first place there was nothing urgent about putting it of record. In the second place the real reason was that in order to pay off Mr. Dewey I knew I would have to borrow some money, and I asked Mr. Green if he would have any objections if he deeded it to me to making an application to the State Land Board for a loan of five thousand. That is the most money that any one person under the rules of the Land Board could get. I at that time had a five thousand loan on my Meridian place, so that I could not get it. He said he would be glad to do it and an application was made to the State Land Board for a loan of $5,000.00 in the name of Mr. Green. I did not procure the loan from the state. They refused it. And then the deed was placed of record.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

Defendant's Exhibit No. 2, being the contract to Mr. Crawford Moore, it was not prepared by me. It was prepared by the firm of Cavanah & Blake, representing Mr. Moore or the First National Bank. I undoubtedly looked the matter over. This instrument provided for the payment of certain stipulated amounts in the event of the resale of the land, so that the price I was to obtain in my negotiations for a resale was fixed by the contract. Mr. Green, from his actions, must have had confidence in me, as he continued to come to me, and that continued during the years 1914 and 1915. I presume it would be said that I represented Mr. Green at a meeting in the fall of 1914 with reference to the settlement of his affairs. Those negotiations culminated in the execution of defendant's exhibit 2. I am inclined to think it was executed about the 11th of November, but I am not sure. After the execution of this agreement in November, 1914, Mr. Green did not continue to consult me regarding the condition of his affairs. There was not much to consult about. I do not recall of his consulting me about anything subsequent to that date. He came to me in the spring of 1915 to get me to write a letter for him to Mr. Moore. I wrote the letter for him and he signed it. I prepared the deed which Mr. Green executed to me and he went to Nellie

T. Wood and acknowledged it. She is the sister of Judge Fremont Wood, a stenographer here, and notary public. In the month of December, 1914, she was working for Judge Fremont Wood. They office on the sixth floor of the Overland building. I am on the third and she is on the sixth. Mr. Green had a great many attorneys act for him when he was administrator of the Satterfield estate. First he had W. E. Borah, next he had the firm of Wood & Wilson, and I am inclined to think that they continued as his attorneys for the balance of his administration so far as the Taylor and Satterfield estates were concerned, and yet during that time he occasionally would come to me with something. There is no doubt but that I appeared in the probate court for Mr. Green in the matter of the Satterfield estate. What I am saying is that I was not a regular attorney of the Taylor and Satterfield estates. I was on no salary and had no retainer. These appearances which I made in the years 1914 and 1915 came about in this way: Mr. Green had been for years selling real estate under the will without getting an order of court therefor or making return of sales, and finally Mr. Green came to me, asked me to make return of sales, or asked me what to do about it, and I told him I would advise making return of sales in bulk on all the stuff that was sold, which was done. I succeeded Mr. Green as administrator shortly after

his death, at the request of John M. Satterfield. I filed an answer in the District Court of the Seventh Judicial District for the County of Canyon, but I see nothing in that that I should retract.

Said instrument was thereupon introduced in evidence as

PLAINTIFF'S EXHIBIT NO. 9.

I have not at any time since this controversy has arisen expressed myself directly or indirectly in a way that would indicate that I felt this property was held in trust or that I should distribute any of the profits among the other heirs of Mr. Green. At the time of my conveyance of this property to the Defendant Buell I took back a mortgage upon the property.

Certified copy of said mortgage introduced in evidence as PLAINTIFF'S EXHIBIT NO. 11.

In the Spring of 1915 two inches of water was diverted from Greenhurst ranch to other lands owned by me.

I filed an answer in the District Court of the Seventh Judicial District for the County of Canyon, reading, among other things, as follows:

> "These defendants deny that said R. E. Green was greatly and largely influenced by the opinion and judgment of the said J. L. Niday, except upon occasions when the said R. E. Green consulted said J. L. Niday as attorney at law and requested his opinion upon matters of law."

CRAWFORD MOORE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise, Idaho. Have lived here about forty years. I am engaged at the present time chiefly in the banking business. I am president of the First National Bank of Idaho. I was acquainted with Mr. R. E. Green in his lifetime. I knew him from my boyhood days up to his death. From 1909 until his death he was a customer of the bank. He did his banking business with the First National Bank of Idaho. I have met him quite often. Along in November, 1914, I had a transaction with Mr. Green in relation to the indebtedness he owed the bank. That is my signature on defendant's exhibit No. 2. This instrument is, as I remember it, an option given by myself to Mr. Green for the purchase of certain property lying near Nampa. We owned the property upon which I gave this option. We obtained it from Mr. Green by deed. That deed was executed as near as I can recollect in November, 1914. I had a talk with Mr. Green in regard to this matter prior to his executing the deed to me, on several occasions. I did not notice any difference in his mental capacity and attitude from what it had been before. He was becoming an old man at the time

he executed this contract, I would judge a man of seventy or seventy-five years old. I think he thoroughly understood the nature of the transaction. He went over it with me in an intelligent way and discussed it in many of the different phases, and at that time I certainly believed that he was in the full possession of his mental faculties, sufficient to transact business, with an absolute knowledge of what he was doing. The consideration to Mr. Green for the land covered by this option was $18,851.53. The amount of land covered by that indebtedness was a little less than three hundred acres. We do not own the land now. We sold it about 1917, I think. We sold it on the basis of the amount that we had paid for the property, plus the interest, less what we had received in return, and we threw off from that amount a thousand dollars to clean up the transaction. We threw off a thousand dollars less than what was due us under the terms of the instrument. I own lands in Idaho, several hundred acres. Have owned lands here for twenty or thirty years, irrigated farms. I am somewhat acquainted with the values of land in the vicinity of Greenhurst in the year 1915. I am acquainted with what is now known as the home place, Greenhurst, of 212 acres. I have been over the land and was reasonably familiar with it at the time of this transaction in 1914. It would be hard to place a definite value on that 212 acres in 1915. I would say

those lands were worth perhaps seventy-five or eighty dollars an acre. That is propably somewhere near the value. In my opinion the increase in the value of lands such as the Greenhurst ranch between the year 1915 and May, 1918, was from two to three times its value in 1914.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

I am familiar with a concern known as the Dewey Investment Company. I have had experience in making loans on farm land since 1914. A loan should be made on the basis of perhaps fifty per cent. of its value. The Dewey Investment Company enjoys a reputation of being safe investors. I would not think they had made an unsafe investment in loaning ten thousand upon the ranch called Greenhurst prior to 1914. A loan of $10,000.00 made upon Greenhurst ranch in 1912 I would say was a safe loan. At the time of the consummation of the transaction which culminated in the instrument marked Defendant's Exhibit No. 2 Mr. Niday represented or accompanied Mr. Green. Mr. Blake was our attorney at the time.

RE-DIRECT EXAMINATION.

By MR. FRASER.

One hundred and six acres of the land which I received the deed for from Mr. Green, and which originally came off the Greenhurst place, I think is the choicest piece of the Greenhurst farm, and I

consider it so to this day. There were no buildings on the place we took. There were buildings on Greenhurst farm. I am not able to estimate their value. Many of the buildings were not what you would call good farm buildings. I think there was a fair house on the land. I think the water rights were the same upon all the land. All of it was Ridenbaugh water on the piece we took. I do not know what the water right on the other was. I made numerous efforts to sell this land prior to the time I sold it in 1917. At the time I got it I placed it in the hands of real estate agents for sale. I do not remember at what price, but we were trying to get out the money we had in the property. These real state men tried to sell it for a period of a few months. Mr. Niday during the time had been making an effort to sell it. We never found an actual purchaser. Mr. Niday did not purchase back from me any of the land included in Defendant's Exhibit No. 2.

J. J. WALLING, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is J. J. Walling. Reside at Nampa, Idaho. Have resided there about thirty-four years. I am in the real estate business. Have been in that business eighteen years. Engaged in buying and

selling irrigated farm lands. I am acquainted with the tract of land of 212 acres known as Greenhurst. I have been upon the property many times. I was acquainted with the market value of lands in the vicinity of Greenhurst in 1915. In my opinion the value of that 212 acres known as Greenhurst ranch in the year 1915 was from fifteen to sixteen thousand. I would think that was the limit of its value. As I look at it, the 212 acres, there is about ninety acres good land. The land on the north and east is undesirable. The land south of the house is rolling; never showed a good crop. The land north of the driveway entering the place from the west is a nice tract of ground and I should judge fifteen acres or thereabouts on the south side of the driveway is a very nice tract of land. Mr. Major and I owned the place on the west of it. We bought that from Scott Anderson. We disposed of it. We were afraid of the drainage situation. When we found out Indian creek was not to be dredged out we wanted to dispose of it and we did. We took a $1,500.00 profit and stood aside. The drainage affects the land as it shows alkali. It shows alkali at the present time on the east side of the drive way of the tract and on the westside of the 212-acre tract. In my opinion the value of such lands as Greenhurst and other irrigated lands

in that vicinity doubled in value from the year 1915 to May, 1918. I know of a great many places that sold at double the value.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

Alkali showed up first, as I recall it, about a year prior to the time we bought that tract west, but it only showed on the northeast corner, just a small corner next to the creek at that time, that is, the 108 acres on the west side of the road, not the 212. We knew that when we bought it, but the report that the Government would dredge the creek made us think they would reclaim it, but instead of getting better it was getting worse continuously. The Greenhurst ranch was always considered a good place, but what I have in mind the best part of the farm was the 108 acres. I think that was conceded by all the farmers and neighbors in that district. The 108 acres was not included in this 212 acres. There was the 108 acres more at the time Mrs. Green operated it. In 1914, '15, and and probably 1916 there was no demand for land. Most of the sales or transfers went through the sheriff's office during that period. There wasn't much sale, mostly foreclosures. Then in 1917 to the fall of 1918 showed the best increase in land in that vicinity. I would say the largest increase in the value of land was in 1918. I bought this land, as I recall, November or December, 1917, held it

until July, 1918, paid about 17,000 for it, sold it at 19,000, and we had to pay interest and pay for the labor and some fencing. We sold it for so small a margin because we were afraid of the seepage. I don't mean that this tract of land involved in this case necessarily doubled in value.

C. A. GLOUGIE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is C. A. Glougie. Reside at Nampa, Idaho. I am engaged in the real estate. I am acquainted with the ranch near Nampa known as the Greenhurst ranch. I have been on the property. I am acquainted with the market value of lands in that vicinity. In my opinion the market value of Greenhurst ranch, 212 acres, say in the year 1915 I would say not to exceed $20,000, if that; $15,000 would have been more than I would have given for it. Would have been more than I would be willing to have paid for it. The value of lands in that vicinity increased between 1915 and 1918 in value. The extent of the increase might be a little difficult question to answer. The good lands, the desirable pieces of property, have increased easily three-fold, where others have not increased that much. I consider a part of Greenhurst desirable land. When I looked over the

Greenhurst ranch with the intention of buying it I figured perhaps one-half the land was all I cared to look at at all, and I did not consider the balance. About half of it was reasonably good land. The balance of it I did not consider of any value.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

I looked at it with the purpose of buying it in the latter part of July or the first of August, 1917.

SCOTT ANDERSON, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is Scott Anderson. I reside in Boise. Have lived in Idaho about nineteen years. Am engaged in farming, real estate and livestock. I am somewhat extensively engaged in farming. We have somewhere in the neighborhood of 2,000 acres of farm lands. Possibly 4,000 acres of grazing lands. I have bought and sold farm lands between the years 1915 and 1918. I am familiar with the prices of farm lands in Ada and Canyon counties in the vicinity of Nampa during those years. I am acquainted with the tract of land known as Greenhurst, containing 212 acres. I have seen the property. In my opinion the reasonable value of that land in the year 1915 would be around twelve to fourteen thousand dollars. I think lands have

increased in value in that vicinity between 1915 and '18. I would say the good lands ,the good productive lands, have increased double. Other lands have not. I purchased a part of what was the old Greenhurst ranch, 306 and a fraction acres. Out of the 306 acres I would say that one tract of 107 acres, or approximately that, had considerably more value than the 212-acre Greenhurst ranch. It was better soil, the location was better, and more productive. I purchased these 300 acres of the old Greenhurst ranch some time in November, 1917. I figured the land on a basis of about seventy dollars an acre. That was the entire tract.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

Q. You got a very good bargain, did you not?

A. Yes, sir.

I sold one tract to Mr. Walling. That was 108 acres or 107 and a fraction. I held it possibly sixty or ninety days and sold it for $17,000.

RE-DIRECT EXAMINATION.

By MR. FRASER.

The time I sold it was about the time the big increase in land commenced. Land was increasing and I sold the land on very reasonable terms, six per cent. interest and a period of several years to pay for it.

JOHN M. GREEN, heretofore produced as a witness on behalf of the plaintiff, having been first

duly sworn, being recalled on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I am the son of R. E. Green. I was present in the court room when Mrs. Acuff testified in regard to an incident that took place just prior to my father's death, where Mr. Niday came out to the house and coerced him to sign some document. I was in the room and present at the time. Mr. Niday brought in a check there which I understood to be a check for $700.00, Taylor and Satterfield check, that was to be signed by my father so that Taylor and Satterfield could get their money out of the bank without any trouble. Mr. Niday stood at one end of the table and I asked him for the check and I took the check and I says, "Father, here is a check to sign, for $700.00, Taylor and Satterfield estate money," and he signed it. I think he realized what he was signing when he signed it. Mr. Niday did not take my father out of the arms of Mrs. Acuff at that time. My father did not walk over to the table where the check was to sign it. I gave him a pen and he just leaned over and signed his name, just as good at that time as he ever signed his name before.

J. C. DEAN, heretofore produced as a witness on behalf of the plaintiff, being first duly sworn, be-

ing recalled on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I am fifty years of age. A am engaged in the business of farming. I am acquainted with what is known as the Greenhurst ranch near Nampa, 212 acres. I have been over I think practically every foot of the land. I lived there and farmed it for two years under a lease from Mr. Niday, the years 1917 and 1918. There was not much value in land in that vicinity at that time. There was not any land selling in that neighborhood up till about the latter part of 1917. I never valued the Greenhurst ranch of 212 acres in the year 1915 from a productive standpoint at over $14,000.00. There has been an increase in the value of such lands between the years 1915 and the spring of 1918. I know good land there that has increased three or four times, and I know some lands that has not increased but very little. There was about one-half of the Greenhurst ranch that was not worth cultivating. I tried to cultivate part of it. I did not make expenses out of it, and Mr. Niday furnished the water and furnished the grass seed. I did not get enough crop off of it to pay the help for irrigating it. The bottom land of Greenhurst compared favorably with other land between Nampa and Meridian. There was several spots of alkali

on the lower part of this Greenhurst ranch along Indian creek. I noticed that these alkali spots were getting more prominent and the alkali is increasing. The land on the Indian creek bottom I consider the best part of the Greenhurst ranch.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

At the time I was on the ranch I discussed with Mr. Niday the question of the alkali on the land. Mr. Niday knew at that time there was alkali on the land.

J. L. NIDAY, heretofore produced as a witness on behalf of the defendants, having been first duly sworn, being recalled, testified as follows:

DIRECT EXAMINATION.

I had been occasionally consulted as an attorney by Mr. Green since 1896 and from that on up to the time he disposed of his property, the year 1914 and 1915. I should consider the reasonable value of my services to Mr. Green as an attorney-at-law during that period of time three or four thousand dollars would be very reasonable. I never presented a bill to Mr. Green for my services. He was the one that brought up the subject in regard to the payment of it. He made the statement to me when he brought it up that if he gave me everything he had in the world it would be very poor pay for what I had done for him, and that was the reason for his executing this deed. I am well

acquainted with Greenhurst ranch. The house on it was built about 1899 or 1900. It is a frame house without foundation. It stands on timbers, in some places 2x4, in other places 2x6, without any other foundation. It is merely boarded in between. The floors are badly settling and are out of level. When it was constructed it was constructed out of old timber and old houses pushed together, and while in a way it is a comfortable house, it is not of great value, it is of very little value. It is a story and a half. Eleven or twelve rooms scattered over a lot of ground. It is in a bad state of preservation and was when I got it. The outbuildings are of very poor quality. The water rights of Greenhurst ranch is what is called at the time I got it a Ridenbaugh right.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

I never made up an itemized statement of my services rendered to Mr. Green. He merely proposed to convey that property to me in payment of it. It was just an off-hand statement.

MOLLIE GREEN NIDAY, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here ever since I was married, about nineteen years. I am the

daughter of R. E. Green, deceased. My father lived at Greenhurst after the death of my mother until 1914. I saw him frequently during that period of time. I saw my father on an average of every week or so. He would either be over in Boise or I would be home. He came to Boise frequently during that period of time. He always visited at my home. After he came to Boise in 1914 until the time of his death I saw him frequently, every day or so. He would come down to the house whenever he wanted to, and I would go out there whenever I wanted to. We were back and forth. From 1909 up until 1914, when he came to Boise, I did not notice any signs of mental decay in my father. He was able to converse intelligently upon all subjects as formerly. The first time I noticed any failure of the mental faculties of my father was after he was ill in January, 1916. I saw him frequently after 1916 until the time of his death. He visited frequently at my home as long as he was able, and when he couldn't walk I would go over in the car. He quit coming down to my home a short time prior to his death in 1917. My father was sick about two weeks and up to about two weeks before his death he was a frequent visitor at my home. He came down and visited my home without any invitation from me or without any solicitation upon my part. At these times I never noticed any indication that he was afraid of myself or Mr. Niday.

So far as I could see from his actions and his demeanor he was willing to be in my company and society and that it was a pleasure for him to be with me. I took an interest in his welfare the last months and years of his life until he passed away. My father never talked to me anything about transferring Greenhurst ranch to Mr. Niday. I did not know that he had made the transfer until after the deed was made. I did not discuss the matter with my father prior to the time Mr. Niday got the property. He never at any time suggested deeding this property to me. I never at any time suggested deeding this property to me. I never made the statement in the presence of my sister, Mrs. Acuff, that my father was crazy. I never considered my father crazy. After he was sick he would have spells that he was very nervous and excitable, but if you would talk slow to him he would understand what you said and he would talk to you. He knew what he was doing practically up to the time of his death. I never made the statement in the presence of Mrs. Acuff that I thought my father was a little off. I didn't consider he was off. In 1915 I think my father was able intelligently to make a conveyance of his property, knowing what he was doing and the value of what he was conveying, and he drew his own checks at that time.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

Mr. Green I think drew these checks at home. I do not think I knew of the execution of the deeds until after my father's death. I absolutely knew nothing of them until after they were made.

MISS NELLIE WOOD, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER:

I reside in Boise. I have resided here since 1890. I am a notary public and was a notary public in the years 1914 and 1915. I was acquainted with R. E. Green in his lifetime. I became acquainted with Mr. Green shortly after he came here. I knew him from that time on until the time of his death. Along in 1915 I did not see him so often, but while he was in Boise in charge of the ditch work I saw him nearly every day for more than ten years. I have visited at the home of Mr. and Mrs. Green while they lived here in Boise. This deed dated the first day of October, 1915, from R. E. Green, widower, to J. L. Niday, conveying what we call the Greenhurst ranch, containing 206 acres, contains Mr. Green's signature, and that is my signature as a witness to his signature. He certainly must have signed it in my presence. I took the acknowledgement to it. Mr. Green appeared before me at that time to have the acknowledgement taken. I re-

member the incident of his coming up and bringing that deed for execution. He was there in the evening and Mr. Wood was there and we had quite a talk with Mr. Green at the time he executed this instrument. At that time I saw nothing to indicate that he was mentally failing. He appeared to be the same as he had been on numerous other occasions. He appeared as he had always appeared when he came to execute an instrument. I had taken his acknowledgement many different times. We visited for some time after I had taken this acknowledgment. He seemed perfectly normal. It had been quite a long time since I had seen him to talk to him and we had quite a visit. Mr. Wood, my brother, Mr. Green, and myself were the only ones present. After he acknowledged it he took the deed and left the office. That is Mr. Green's signature to this other deed dated the 22d day of December, 1914, executed by Mr. Green to Mr. Niday and containing six acres of land more or less. I also signed that deed as witness to his signature. I took Mr. Green's acknowledgment to that instrument on the day it purports to be. I do not remember of Mr. Niday ever being in the office with Mr. Green when any instrument outside of the estate matters that he used to be administrator of were executed. At the time of the execution of this instrument I did not notice any difference mentally in Mr. Green from

what he had been at prior times when I saw a conversed with him.

The original deeds above testified to by the witness as having been executed by Mr. Green in her presence were introduced in evidence and marked

PLAINTIFF'S EXHIBITS Nos. 1 and 2.

CROSS-EXAMINATION.

By R. MONTGOMERY.

I do not think Mr. Niday was present on either of these occasions. One of them was executed just about closing time, along between five and six probably. I do not remember the time of the other.

MRS. MARGARET BOWERS, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here over thirty years. I was very well acquainted with Mr. R. E. Green from the time he came to Boise. I saw him very frequently. The first two or three years he lived in Boise he was a near neighbor. I saw him almost daily. I saw Mr. Green frequently after he moved over to what is known as Greenhurst, often at his office and often in my home. After he came back to Boise, in the fall of 1914, I saw him quite frequently. During the year 1914 I remember of his being in my home a time or two, and I met him frequently at Mr. Niday's home. I have talked with

Mr. Green a great deal. He was a man that had very sound judgment in business affairs, but he was a man that took a great interest in art and in books generally. In the years 1914 and 1915, during the times that I saw and talked with Mr. Green, I did not notice that he was failing mentally to any great extent, always alert, very alert in talking. I noticed that Mr. Green began to fail mentally after he had a spell of pneumonia, in January I think it was, 1916. From that time I never saw him so often, but I never saw him at any time but what he would answer all questions and seem alert until just a few days before he died. I had charge of the art exhibit at the state fair in 1915 and that fair was held from the 4th to the 8th day of October, 1915. A day or two before the fair opened I wanted Mrs. Niday to assist me at the grounds a little. We drove down to her house and Mr. Green was out on the tennis court with the children. My husband called to him and he came out and got into the car and went out with us, and discussed all works of art as intelligently as he ever had, enough so that it attracted the attention of several of the artists there. Mr. Green was looking at two pictures a long time, examining them, and then said, "There is a mistake there; that person never painted those two pictures," and he explained why, but I am not enough of an artist to go into that. I met Mr. Green very frequently after he came to

Boise in 1914. I think Mrs. Niday was always kind and thoughtful of him. I never heard her speak disrespectfully in any way to her father, her mother, or to her grandmother. I was at Mr. and Mrs. Niday's home on Christmas of 1915. I was there and spent the afternoon and had dinner with them. Mr. Green was there all afternoon. I talked with him a great deal that afternoon, and I remember his conversation was largely on the school question, and he went back to the days when he was teaching in New York, and then books and everything else that he usually talked about. I did not notice any handicap or have any reason to believe at that time from my talk with him that he was not in full possession of his mental faculties.

DR. L. C. BOWERS, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here since 1890. I was acquainted with R. E. Green in his lifetime. I knew him from 1896 up until the time of his death. My relationship with him was both social and that of patient and doctor. For a number of years I was the family physician. I have visited at his home and he visited at mine. I saw him frequently from 1914 to the time of his death. I was called to visit Mr. Green professionally in January,

1916. I found he had acute lobar pneumonia. In my visits with Mr. Green in my conversations with him during the years 1914 and '15 I always found him normal. I did not notice that he was declining mentally or was different from what he had been. He appeared as normal to me as he had been before. I did notice a mental decline in Mr. Green following his pneumonia in 1916. I noticed he was more reticent, less social, quieter. He was troubled with a physical defect which seemed to worry him more than previously. In the years from 1916 until shortly before his death when I talked to him he understood what I was talking about perfectly. In my opinion he was capable of transacting business even after he had pneumonia. I believe he would know what he was doing and the nature of the act. I was at Mr. and Mrs. Niday's on Christmas day, 1915. Mr. Green was there. I had a talk with him at that time. I did not notice at that time any failure of his mental faculties. He appeared to me at that time the same as he had years before, in splendid spirits that day.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

If Mr. Green was suffering from any mental worries that day he did not make them known to me. Mr. Green's daughter Gratia called on me in regard to his condition. The subject was the matter of his illness. I tried to impress her that he

was seriously ill. In 1916 I made the diagnosis of pneumonia. I do not recall my conversation with Gratia at that time, only to that extent. I do not remember that I advised her as to his mental condition. He was delirious much of the time, as we were in pneumonia. The delirious condition in which I found him was produced by the pneumonia.

ELIZABETH LORE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. I was acquainted with Mr. R. E. Green in his lifetime. I first became acquainted with him probably fifteen years ago. He was at Nampa, Greenhurst. I was living at Nampa then. I visited his home at Greenhurst. I became very well acquainted with him and his family. I remember when he left Nampa and came over to Boise. I saw him very often after he came to Boise. I saw him in the years 1914 and 1915 nearly every week. I stayed out there once in a while at nights with them and saw them very often. I always conversed with Mr. Green upon these occasions. I did not notice any signs of mental decay in Mr. Green in 1914 and 1915. He could converse with me as intelligently, the same as he had always done before. I did not notice any difference in his demeanor or actions in 1914 and 1915 from

what they had been when I knew him on the ranch. He was always just the same. I saw Mrs. Niday out there very often. I saw her and her father together frequently. She was always very sweet to her father when I have been around. Her father did not show any signs of aversion to her or being afraid of her. They seemed to be very companionable. She was very kind to him, took him out riding, took him to picture shows and the grand opera. I thought she was very kind to him.

CROSS-EXAMINATION.

By MR. MONTGOMERY.

Between November, 1914, and May I was a visitor at Mr. Green's home in Boise. Mrs. Wager was taking care of him at that time. I visited there every week or so or maybe twice a week. Sometimes I stayed all night. These visits were confined to a period between November, 1914, and May, 1915. I saw him after that, not very often. We were there to dinner in the fall of 1915. He served at the table and he was very nice.

J. L. NIDAY, heretofore produced as a witness on behalf of the defendants, having been duly sworn, being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I had a talk with Mr. Philo Green in regard to the execution of this deed made by his father and delivered to me. This conversation was, I think,

the next day after Mr. Green's funeral. Gratia Acuff asked me if we could not have a meeting at my office and talk over Mr. Green' affairs. I told her I would be glad to, and we met there. There was at that meeting Gratia, Philo and George L., and I think Mrs. Niday and myself. After discussing various things concerning the estate and the indebtedness and so forth, Philo asked to see the deed that his father had given me. I went to the safe and got out the deed. He examined the signature and he said, "That is father's signature and that settles it with me," and he handed the deed back to me. There were present at that time Mrs. Acuff, George L. Green, Philo Green, Mrs. Niday, and myself. I think this was the day after Mr. Green's funeral.

GRATIA K. ACUFF, a witness heretofore produced on behalf of the plaintiff, having been duly sworn, being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION.

BY MR. MONTGOMERY.

I recall paying a visit to Dr. Bowers with reference to my father's condition. That visit was while he was so bad at the last of his illness. It was while my father was in such a troubled condition that it was almost impossible to hold him. My brother Jack was taking the burden of the care of him. This conversation with the doctor was a

couple of weeks before father died. Dr. Bowers and I had a long talk and we talked, among other things, of mental pauses. I was absolutely certain in my own mind that there was nothing physically wrong with my father during those years previous to his last hard illness. Well, maybe the last two or three years. Dr. Bowers explained to me in detail mental deterioration and he said that it had been coming on for a good many years, that he could not help it and could do nothing. I also discussed with Mrs. Lore the subject of my father's condition. At various times Mrs. Lore offered her sympathy to me, and talked of various ones in the family, of father's physical condition. This was during the last year before his death. She expressed sympathy, thought it was too bad about Mr. Green's condition, and the thing she deplored was his mental condition.

ELIZABETH LORE, heretofore produced as a witness on behalf of the defendants, having been duly sworn, recalled in surrebuttal, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I do not remember having any conversation with Mrs. Acuff in which I sympathized with her on account of her father's mental condition. I may

have sympathized with her over his illness. I was never there when Mr. Green was real sick.

DEFENDANTS REST.

PLAINTIFF'S EXHIBITS.

No. 1.

Being a deed from R. E. Green, widower, of Boise, Idaho, party of the first part, to J. L. Niday, of Boise, Idaho, party of the second part, consideration $1.00; conveying that part of the northeast quarter of the northwest quarter of Section 6 in Township 2 North, Range 1 West, Boise Meridian, lying north and east of the right-of-way of the Oregon Short Line Railway Company, containing six acres more or less, said deed being dated the 22d day of December, 1914; acknowledged before Nellie T. Wood, notary public.

No. 2.

Being warranty deed dated the 1st day of October, 1915, between R. E. Green, widower, of Boise, Ada County, Idaho, grantor, to J. L. Niday, of Boise, Idaho, grantee; consideration $1.00 and other valuable considerations; conveying to said J. L. Niday the southeast quarter of the northwest quarter and lots numbered 2 and 3 and all that part of lot numbered 4 lying north and east of the right-of-way of the Oregon Short Line Railway Company and the east half of the southeast quarter, except three acres thereof, all in Section 31,

Township 3 North, Range 1 West, Boise Meridian, containing 206 acres, more or less, together with water rights thereunto belonging or in any wise appertaining. Said deed contains the following clause: "The conveyance of the above described property is made subject to a certain mortgage for $10,000.00 made in favor of E. H. Dewey, trustee, recorded in book 48 of Mortgages, at page 81, also subject to a certain mortgage for $1,683.85 in favor of E. H. Dewey, trustee, recorded in book 59 of Mortgages, at page 89, of the records of Canyon County, which said mortgages said second party assumes and agrees to pay. Said deed being acknowledged before Nellie T. Wood, notary public, and recorded the 27th day of May, 1916, in the office of the Auditor and Recorder of Canyon County, Idaho, and recorded in Book 74 of Deeds, at page 252 thereof.

No. 3.

"June 4/18

"Dear Jule & all:—

"This has been a very hot day. We rented the house where Father's things were stored and we had to move them again. This makes four times. Help is out of the question here, so it is do it yourself. Niday sits here and after reading your letter thought we would write tonight. Am so busy with Red Cross during the day hardly have time to cook meals.

"Now Jule when Father found he could not save his property he came to Mr. N—and said he wanted him to take Greenhurst, if he thought he could save it, and you will remember that Niday asked Joe if he could contribute toward saving it, and take a proportionate interest & stated to him that if we could hold on long enough real estate would come back and you remember at that time farm as well as city property was but little in demand—in fact, no purchasers for it, but Joe said he simply could not; he did not have the money and it was either Niday or Dewey as Dewey was going to foreclose. Niday also suggested this to the rest of the children with the possible exception of Dr. Philo. The boys could not take it so we raised the money at a time when Dewey was afraid he would have to take it and took a big chance as we well knew it would have to be carried at a big loss each year we held it and that we could only hope to make up in an event of sale.

"When we took Greenhurst it was certainly in bad shape and it has been a big expense to get it in good condition, and it was more sentiment than anything else.

"When Niday started to settle things Father was over $40,000 in debt, and if it had not been for Niday working his head nearly off everything would have been wiped out, even Father's personal effects, which we had to protect. The state lands and Ward

place went to Moore. Templeton mortgage took the land across from Stephenson's place. Charlie Lewis mortgage took house Jim lived in and we were fortunate to settle that way, so that left only the home place east of the N. & S. road some of it still in sage brush at least 40 A and the land between the house & R. R. in such shape nothing could be raised on it. When Father came to Boise he had $500 which was put in certificates $100 each and was used in paying a/ his debts personal expense as long as it lasted which was not long.

2.

This was all by check and I have the record.

"Father was over $1000 in debt when he came to Boise it just seemed as if every one had an a/c against him. Nampa Dept a large a/c Hardware, Drugs, Meat, etc., but all were paid in full. It seems strange to us at this time something like 4 yrs after Father deeded this property that such a furor should be raised about this business when not a word said during the time Father was here being cared for all of this known during that time the deed having been put of public record.

"Jule I asked Father what he wanted done with "Falconers" and he said I want you to have it, Jule has the brackets and they came from the Centenial, and he wanted Gratia to have a picture, but she did not seem to want one, Jim knew this and said he told you or Joe, when he was there.

"There was an effort made to distribute pictures and things to those who wanted them and if we have any more it was because we thought they should bring more than was bid on them, same with some of the other traps.

"One of the great thorns in the flesh here is the piano deal which you know Father gave Jim and was in accord with your wishes and how hard I tried to get it moved before Father's death.

"Now Jule there is no need of any trouble over this, and after Father's death every thing was gone over in detail with all that were here and I told you about it last summer.

"It has been a puzzle to know what to do with things left and have thought best to send another notice to all and sell things so no one can say anything was done they did not know about. Will send statement of things you bought and receipts.

"I have not rec. the last bill from Standard for sending bronze yet, and Jim will settle the money as everything is paid Admr. he has charge of every thing.

"Now Jule everything was known and when the brothers & sisters was in Niday's office after Father passed away all the papers were gone over and at that time Niday showed them the deed and Gratia & Dr. said if after the bills were paid if anything was coming to any one they wanted their share give to Aunt Carrie and that compelled the

expense of having it probated as no one had any right to do a thing but an Admr. and Jim made out the inventory & has handled everything. We have been looking for Joe. Jim said he was coming this way. Now Jule if there is any thing more you want to know just write us and it can be explained.

3.

"I took Jim and family and K. & M. and we went to the cemetery decoration day we had very beautiful flowers and the lot looked the best I have seen it, a new man.

"Don't talk to me about renting houses. We spend a year's rent getting these ready and then every tenant wants more. Niday sits here helping write this, did not want to wait until I answered. When N—comes he will go over anything with you you do not understand. No there is no occasion to have any misunderstanding about a thing.

"Yes Jule I will be glad when this is all closed up. No one has had the hard work & worry like I have and if I felt like myself I would not mind it, the thing that gets me is my knees ache so I can not sleep. Dr. here wants me to go to 'Hot Lake' but the hot mud did not seem to help mother much only for the time being.

"I am still working for the Red Cross the ladies here are about to take up Refugee work making

children's clothes and they are so anxious for me to take charge of the cutting but I do not know yet. I certainly can't take on much more, now but may feel better in a week or so. Sending clipping of paper it says we have stopped for a time but this is how I looked Saturday and am still working.

"The cemetery lot is still in Father's name although it has been probated but it will be necessary for some one to hold the title & we thought it would be better as long as Jim's baby is laid there it would be better for Jim to hold it. To do this it will be desirable to have a quit claim signed by all the heirs until such time as the city takes it over. Will this plan meet with your approval? Now Jule if you or Joe want to know anything write and you may rest assured if anything is left it will be divided equal and all treated alike.

"The idea of Jim farming Greenhurst would have meant his working his head off and then going broke as the only salvation for Greenhurst is stocking it heavy with pure breds and the expense almost prohibitive. Stock is out of reach almost in price. Think Jim is going to do fine with the Silo business his salary goes on the same and he gets a com. They keep his car up repairs, etc. He said you let him have $400 and he wanted $350 more and we were glad to let him have it. Then N— is putting him on to stock com. He can work it when out with Silos buying & selling stock. N— says

Jim would be fine at it and it takes little or no capital, and means good money.

"Aunt Margaret was telling about seeing we had a lawn party at Greenhurst. You

4.

would have thought so if you could have seen it. We had some sandwiches and Mrs. Dean brought out a pitcher of milk and it kept us busy chasing lambs away until we swallowed the bread. Mrs. Dean is very pleasant and when N— goes over on business we ride along and go on to the Caldwell ranch, but I can not stand it to go any more am all in when I get home, too tired to ride. When this is settled up Jim will make a statement. We may be able to get something out of Depew near Buffalo. Mother paid $1000 for it, and the creamery stock R. R. stock etc., Niday & Jim are trying to sell it. Well I guess I have answered all your questions but if not write. And do not think for one minute that everything is not open & above board. We had to give up our recital. I was not able to play, so that is off my mind. Jim & Aunt M— were very much impressed with Miss Lowe and thought she was charming. Now don't think that being at this end trying to get this settled up has been any picnic, and I have often wished some of the rest could have taken a hand at it.

"Must close with love to all.

Niday & Mollie."

No. 4.

"J. L. NIDAY
ATTORNEY AT LAW
BOISE, IDAHO

July 5, 1918.

"Mrs. J. A. Graef,
Portland, Oregon.
Dear Julia:

"Your favor of recent date has come to hand, and I will say you did quite right in going to headquarters for information, and everything that I have at hand I will furnish to you in the matter of your father's estate. You will recall that Mr. Green moved to Boise in the fall of the year 1914. He had just had a sale of his personal property at the ranch, and at that time was quite heavily in debt at the Citizens Bank of Nampa and Mr. Larson, the cashier of that Bank had charge of the sale, and upon settlement with him by your father the indebtedness due the Bank was deducted leaving Mr. Green in the neighborhood of $500.00 in cash, which he brought to Boise, and as I remember it, placed the money in the Idaho National Bank, and took five $100.00 certificates of deposit therefor. This money Mr. Green looked after himself, and I have no record of its expenditure, as it was done under his own supervision and order. It went into his living expenses, however, and in the payment of his miscellaneous bills at Nampa. These

were not all paid at once, but payments made along on them until some time later when the whole of them was paid, and entirely cleaned up. I do not remember how much money he got out of the sale of his personal effects, but do know that most of it, in fact all of it but substantially $500.00 went to the Citizens Bank of Nampa in payment of money borrowed from that Bank, and the rest of it went as above set forth.

"Now as to the real estate holdings. As you probably know, your father was indebted to Charley Lewis in the sum of $3,266.00, principal, with accumulated interest making approximately $4,000.00 which we succeeded in getting paid by deeding Lots 6, 7, 8, 9, and 11 of Elmwood place, known as "Jim's property" and a team of horses. This being in full of Charley Lewis's demands against Mr. Green, and thereby that item was cleared, with no money coming to your father therefrom. In fact it was doubtless a good deal to make from his standpoint.

2.

"You probably also know that Mr. Green was indebted to John Templeton and Lizzie in a considerable amount, I have not at hand the exact figures, but approximately $4,000. This was secured on that part of the E½ of the SE¼ of Sec. 36 lying South of the Oregon Short Line Railway, comprising about forty acres. This tract you will recall,

lay just across the road north of where the Stephensons lived.

"Your father owed the First National Bank of Idaho approximately $19,000. This sum was made up of various items, among which was money borrowed directly from the Bank which with accumulated interest was approximately $10,000, and with mortgages to secure money borrowed from Volkner, Mullen and Hardiman, the security being that part of Greenhurst lying North and East of the Oregon Short Line Railway and North of the North and South road, being the road that the lane to the house connects with, comprising approximately 108 acres, and the "Ward place," which you will recall as being close Callopey Station, comprising 80 acres, and what is known as the "Hastriter place," comprising 65 acres. These three tracts went to Moore, or the First National Bank, but Mr. Green retained the right to redeem these within one year from the date.

"That part of Greenhurst ranch, comprising 212 acres lying South of the North and South road above mentioned was mortgaged to E. H. Dewey, which with accumulated interest amounted to about $13,000. At that time Mr. Dewey had given your father to understand that that would have to be paid when due January 1, 1916. Mr. Green said that it was out of the question for him to pay it, and real estate then being "in the dumps," there being

scarcely no demand for farm property in this locality, and the ranch being unable to pay interest on anything close to this sum, it seemed a hopeless case. Mr. Green stated to me that in as much as I had been looking after his business all these years and had never been paid anything for it, that he would like for me to have it, if I was in aposition to handle it; that he knew it would not pay its way with the interest burden, taxes and water rents that it had to carry, and would have to be carried at a loss until times or conditions changed. I knew under existing conditions that if Mr. Dewey started foreclosure proceedings that he would get the property, and I was in a position that I could handle it and he made me deed for it. This deed was dated October 1, 1915. I had before that time taken up with the different members of the family, Graef, Jim, Gracia, in fact all of them unless it were Phy, the advisability of all the family contributing to pay off this indebtedness, telling them that we would have to see that Mr. Green was supported during his lifetime and that it was too bad to let all of this property go, but none of them were in a position to aid in this purpose. Come what may, I intended

3.

to see that Mr. Green had what he wanted during his lifetime and therefore when he offered to deed that property to me I accepted it, and as I supposed then, and think yet, the family knew. At

that time Mr. Green was at himself, and that was done which he desired done. If conditions had remained as they were then, I would not have made anything to speak of out of the property, and can not even now pay interest on the investment that I have in it, nor can any one else unless the place is stocked, and of course that entails its additional responsibility in capital as well as time.

"Now, Julia the above is substantially true and correct. I have not included in the statement which I mail you any charges for rent, or the thousand and one small things that has entered into this transaction, but I certainly have been open and above board in all the dealings I have had relative thereto. It is only a lapse of time, and of conditions that would lead any member of the family to think otherwise. It has so turned out, that I may make some money on Greenhurst ranch when the sale is finally consummated, but if I do it is largely, if not entirely, due to my own labor to that end. I have certainly lost money on it ever since I have owned it in its operation, but of course have built it up and shaped it that I might sell. Had conditions remained as they were when it was deeded to me, and I had lost money on it, as I certainly would have done in that case, I don't apprehend any one would have come forward and suggested bearing a part of the loss, but as I probably will make some money out of it by selling, it is slightly different.

However, I have always intended, and so stated to the members of the family here, after Mr. Green had passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do. In this all will be treated alike without discrimination. I have contracted to sell the place with a small payment down, and later will know what the outcome will be, and when sufficient is paid that a sale will be assured, I will carry out the purpose above stated, not as a legal obligation, but with the feeling that if I make something out of the property I would like for the children all to share in it, not equally with me, as I am the one who resumed the responsibility and took the risk, but substantially.

"I have endeavored in the foregoing statement and the itemized account enclosed herewith to set forth the conditions as they are, and as fully as I could do without spending a great deal of time in non-essential details, but if I have overlooked anything that you desire to know more concerning I would appreciate your advising me fully and frankly what it is and what you desire to know. So far as I am concerned I have no secrets in this matter.

"I might add to the foregoing that had I known any member of the family desired to invest money to save this property, we could just as well have saved some ten or twelve thousand dollars out of that portion deeded to Mr. Moore. I contemplated

a long time the question of taking this up from Moore, feeling certain that

4.

there was at least $10,000 in it, but as I knew it would be a losing proposition, unless I could sell, and conditions still remaining dull for sales, I hesitated to take the chance, and yet I felt certain that there was substantially as much margin in this as there was in Greenhurst. There is no doubt that the thing to have done, had we been in a position to take advantage of it, was to have paid off the whole of this indebtedness, something over $40,000.00, and taken the time to turn it to advantage, but a matter of this magnitude could not be handled in a minute by people of small means, and everything being due and taxes, interest and water charges piling up, it was imperative that something be done promptly, as foreclosures would have meant, not only loss of all the property, but humiliation as well. In considering all of these matters too, we must not overlook the fact that farm property has probably advanced 50% in value since that time.

"There is one other item I overlooked in its order, and that is a payment of $200 from Mr. Lesh on his lease of Greenhurst for the year 1915, due on or before May 1 of that year. This money was

paid directly to Mr. Green and handled by him, and I therefore have no account of its expenditure.

"Sincerely yours,

JLN:A

No. 7.

Being a warranty deed dated the 14th day of December, 1918, between J. L. Niday and Mary A. Niday, his wife, of Boise, Ada County, Idaho, the grantors, to A. L. Green and George A. Buell, of Nampa, Canyon County, Idaho, the grantees; consideration $30,000.00; conveying to said grantees the lands described in plaintiff's complaint and designated as the Greenhurst ranch, containing 212 acres, more or less; acknowledged before Nellie T. Wood, notary public, and recorded in the office of the auditor and recorder of Canyon County on the 2d day of January, 1919.

No. 11.

Being a copy of a mortgage made on the 14th day of December, 1918, between A. L. Green, bachelor, and George A. Buell and Effie A. Buell, husband and wife, as parties of the first part, to J. L. Niday, of Boise, Idaho, as mortgagee, as party of the second part; consideration, $23,000.00. The lands described in said mortgage being the same lands as mentioned in plaintiff's complaint and known as the Greenhurst ranch, containing 212 acres of land,

more or less. Said mortgage being given to secure a principal note in the sum of $23,000.00, dated Boise, Idaho, May 14, 1918, due on or before ten years after date, with interest thereon from date at the rate of seven per cent. per annum, interest to be paid annually. Said mortgage being recorded in the records of Canyon County on the 2d day of January, 1919.

DEFENDANTS' EXHIBITS.

No. 1.

"Portland, Ore.
Mar. 27, 1917.

"Dear Mr. Niday:

"I have written to Mollie several times but apparently she hasn't received the letters, as she has written several since Dad died asking why I don't write, and why Joe didnt answer your letter. I phoned Joe and he said he hadn't had any but I just remember now a letter that came here. I opened it and phoned him to mail the $5 to the man at Seaside and he did.

"Dear Auntie and Grandma moved in short order. I was surprised to hear they were already in Nampa. Grandma, in particular will miss Mollie; it has been quite a strain on you people mentally besides financially to run two places.

"I told Mollie in my other letters, that she didn't get, that Joe and I want you both to know that

whatever you decide about Father's affairs is all right with us.

"We sincerely hope that you will be able to swing yourself out of the ranch debt; of course, if you strike gold or oil on the ranch will be glad to know.

"After you probate, will Jim be able to get that piano? I guess the rest wouldn't care and I doubt if it would sell for anything.

"When I was there summer before last Dad was using a pair of pruning shears; if you run across them I'd like to have them on his account, if none of the rest care.

"Joe is quite busy and has quite a crew working, painting an English ship at "The Northwest Steel Works." Says he never painted a boat before but he will know all about it when he gets through. Leaves before seven in the morning as they start work at seven thirty.

"Sorry to hear Kathleen has been sick, she's pretty old to be just having measles.

"Taylor has been very sick again but is better now and doing some building out in Laurelhurst.

"Ella Martin, (who used to be a neighbor) is to marry Mr. Meko next Tuesday, going to Frisco on a wedding trip.

"Mrs. Romig has limbered up a little and we now speak very nicely and politely but no more running back and forth like there used to be. I'm cultivat-

ing "Back to the Home" Movement.

"Dorothy has had earache for two days, bad ear left from masles.

"Dr. Abele has applied as "Chief Surgeon" in one of the Oregon companies.

"The new Interstate bridge across the Columbia and the R. R. bridge here across the Willamette are both guarded by militia.

"These news items are added for Mollie and see that she gets this letter too so she will know I wrote.

"Since Dad had to go, I'm glad that business dealings with Aunt C. ended agreeably. It even seems as though we wouldn't hear from Grandma much any more, she lived a good many years with Dad and had the best there was while he had it. No one could have any but the kindest memories of him and we certainly appreciate your kindness and thoughtfulness where he was concerned.

"No one else could have done what you did and held the rest level at the same time. In settling his affairs, if there is any occasion to know what we think, remember we think as you and Mollie do. Four agree. Wonderful.

"Love to all.

"Julia and Joe.'

"P. S. Just had a note from Mollie for Joe to send in claim for money he loaned Dad. I looked through a box of old papers and found the check,

will enclose it and Joe can mail a claim from the office.

"When you have time or if you haven't, maybe Mollie will, explain how Dad's affairs stand.

"Tell Mollie to tell me if mail reaches her better if addressed to your office. Julia."

The above and foregoing statement is hereby settled and allowed as the statement on appeal in the above entitled action.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 11, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above named defendants, conceiving themselves aggrieved by the final order and decree adjudging the plaintiff to be entitled to a one-half (½) undivided interest in and to those certain securities owned and claimed by defendant, J. L. Niday, said securities being taken as part of the purchase price of the lands described in complainant's complaint, and also conceiving themselves aggrieved from the final decree of accounting, said decree having been made and entered in the above entitled cause on the 26th day of February, 1921, they hereby appeal from said final order and de-

cree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon their filing a bond for the payment of all damages and costs if they fail to prosecute the said appeal to effect.

J. L. NIDAY,
MOLLIE GREEN NIDAY,
GEORGE A. BUELL,
EFFIE ADA BUELL, and
A. L. GREEN.
By ALFRED A. FRASER,
Solicitor for Defendants.

Petition granted and appeal allowed.

FRANK S. DIETRICH,
Judge.

July 22, 1921.

Endorsed: Filed July 22, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

This day came the defendants in the above en-

titled suit appearing by Alfred A. Fraser, their solicitor of record and presented their petition for an appeal and an assignment of errors accompanying the same, which petition is hereby allowed and the Court allows an appeal of the above entitled suit to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon the filing of a bond in the sum of $200.00, with good and sufficient security to be approved by the Court.

FRANK S. DIETRICH,

Judge.

Dated, Boise, Idaho, this 22d day of July, 1921.

Endorsed: Filed July 22, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Now on this 21st day of July, 1921, came the defendants by their solicitor, Alfred A. Freser, and say that the decree entered in the above entitled cause on the 26th day of February, 1921, is erroneous and unjust to the defendants.

I.

Because the Court erred in not dismissing said action on account of the staleness of the claim and for the further reason that the plaintiff was guilty of such laches as not to be entitled to any relief in a court of equity.

II

Because the Court erred in not dismissing so much of the plaintiff's claim as is based upon the assignment to her of the interests of Filo F. Green and Gratia K. Acuff, of the subject matter of this suit on account of the staleness of such claim and laches of said Filo F. Green and Gratia K. Acuff; and the Court erred in granting any relief to said plaintiff on these assigned claims.

III.

Because the Court errer in not dismissing the plaintiff's bill of complaint for the reason that there is no allegation in said bill of complaint offering on the part of the plaintiff to do equity or to place the defendants in statu quo; and for the further reason that there was no offer made by the plaintiff upon the trial of said action offering to do equity or to place the defendants in statu quo.

IV.

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

V.

Because the Court erred in not dismissing the suit for the reason that the evidence shows that the plaintiff procured the assignments to her of the interests in the subject matter of the suit of Filo F.

Green and Gratia K. Acuff, for the sole purpose of confirming jurisdiction of the trial court.

VI.

Because the Court erred in overruling defendants' objection to the introduction in evidence of the complainant's Exhibit No. 8, which was introduced for the purpose of impeaching the witness John M. Green, called on behalf of the complainant.

VII.

Because the Court erred in holding that the deed to the lands described in the complainant's complaint, known as Greenhurst Ranch was given to the defendant, J. L. Niday, without adequate or sufficient consideration.

VIII.

Because the Court erred upon the accounting between the parties in denying to the defendant, J. L. Niday, a credit in the sum of Four Thousand ($4,000.00) Dollars, earned by him in professional services rendered said R. E. Green prior to the execution of said deed.

IX.

Because the Court erred in holding in the interlocutory decree that the deed dated the 22nd day of December, 1914, and the deed dated the 1st day of October, 1915, are or were voidable at the instance on the grantor, R. E. Green or his heirs.

X.

Because the Court erred in adjudging and de-

creeing to the complainant, Julia Green Graef, in her own right and as assignee of the interests of Filo F. Green and Gratia K. Acuff, to be entitled to a one-half interest in and to, or the proceeds of the sale of the lands described in plaintiff's complaint.

XI.

Because the Court erred in holding that the complainant is entitled to a one-half interest in and to that certain mortgage bearing date of the 14th day of December, 1918, and recorded at page 279 of Book 70, of the mortgage records of Canyon County, Idaho, said mortgage covering the property described in complainant's complaint and also in decreeing said complainant to be entitled to a one-half interest in the note secured by said mortgage, which said note represents the balance of the purchase price of said Greenhurst ranch.

XII.

Because the Court erred in decreeing and requiring the defendant, J. L: Niday, to deposit in the Boise City National Bank an assignment in due form of a one-half interest in and to the note and mortgage above mentioned.

XIII.

Because the Court erred in granting or decreeing to the complainant any relief whatsoever in this suit.

ALFRED A. FRASER,
Solicitor for Defendants.

Endorsed: Filed July 22, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanzer, Deputy.

(Title of Court and Cause.)

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, J. L. Niday, as principal, and A. R. Cruzen, as sureties, acknowledge ourselves to be indebted to Julia Green Graef, appellee in the above cause in the sum of $200.00, conditioned that, whereas, on the 26th day of February, 1921, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that Court, wherein Julia Green Graef was plaintiff and J. L. Niday, and Mollie Green Niday, his wife, George A. Buell and Effie Ada Buell, his wife, and A. L. Green were defendants, a decree was rendered against the said defendants and said defendants having obtained an appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit Court and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree and a citation directed to the said Julia Green Graef citing and admonishing her to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit Court, to be holden in the City of San Francisco, in the State of California on the 22d day of August, 1921, next.

NOW, if the said defendants or either of them shall prosecute an appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

J. L. NIDAY,
A. R. CRUZEN.

The above and foregoing bond is hereby approved by me this 25th day of July, 1921.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed July 25, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,)
) ss.
Ninth Judicial Circuit.)

To J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green, Greeting:

Whereas, Julia Green Graef, appellant in the above entitled suit, has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from a decree lately entered in the District Court of the United States for the District of Idaho, Southern Division, made in favor of you,

the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and has filed the security required by law; you are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 22nd day of August next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Boise in the Ninth Judicial Circuit this 22d day of July, in the year of our Lord One Thousand, Nine Hundred Twenty-one.

FRANK S. DIETRICH,
Judge of the District Court of the United States.

Due service of the within Citation on Appeal, by certified copy thereof, as required by law, is hereby acknowledged at Boise, Idaho, this 22nd day of July, 1921.

ALFRED A. FRASER,
Of Solicitors for Appellees.

Endorsed: Filed July 22, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the above named Court:

Whereas the defendants in the above entitled action desire to appeal from the judgment heretofore rendered in said case, you will please prepare and certify for the appeal of the defendants herein to the Circuit Court of Appeals of the United States for the Ninth Circuit copies of the following:

(1) Plaintiff's complaint.
(2) Answers of defendants.
(3) Original decision of the Court filed October 25, 1920.
4) Interlocutory decree of the Court, filed December 23, 1920.
(5) Final decree of the Court, filed February 25, 1921.
(6) Prepared statement of the evidence which has been lodged in the Clerk's office by the appellants.
(7) Defendants' petition for appeal and citation on appeal.
(8) Order allowing appeal.
(9) Assignment of errors.
(10) Appeal bond.
(11) Citation showing acceptance of service thereof.
(12) Certificate of the Clerk.

ALFRED A. FRASER,
Solicitor for the Defendants.

Endorsed: Filed Aug. 11, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STATEMENT OF JULIA GREEN GRAEF, APPELLEE AND CROSS APPELLANT.

This cause came on to be heard before the above entitled Court on the 4th day of October, 1920, and after the close of all the evidence it was stipulated between the plaintiff and the defendants, acting by their respective attorneys of record, that if a decree was entered in favor of the plaintiff the plaintiff would consent that the title which she received under such decree could be confirmed in the defendants, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and thereafter and following the rendition of the interlocutory decree of the Court in favor of the plaintiff the cause again came on for hearing for the purpose of determining an accounting between the plaintiff and the defendant J. L. Niday, at which time the following proceedings were had, to-wit:

MR. FRASER: If the Court please, this is the morning set for final hearing in the case of Graef v. Niday. I will state in the opening that it is a rather inconvenient time for myself, for the reason that we have had a hearing before the Public Utilities on the telephone rates for the state. We expected to get through Saturday night, and there are eight or ten witnesses here from Denver and Salt Lake, and we could finish today, and those

witnesses could go home. Mr. Montgomery informs me, however, that he has a matter set in Portland that necessitates his getting away this evening, if he can, so we are both in a rather embarrassing situation; but we thought perhaps if we could call the Court's attention to the matters in dispute the Court might indicate its ruling, and it is possible that we could finish the matter this forenoon, and I could have the afternoon before the Utilities, and Mr. Montgomery could get away.

One of the matters in dispute, if the Court please, is as follows: In the former hearing in this case Mr. Niday testified as to the payment of this mortgage on the land, and of course that matter is not in dispute. He also testified in regard to the transaction between himself and Mr. Green by which title was vested in himself, that there were two pieces of land, one of six acres and the other the larger tract, and in regard to the six-acre tract he testified that he got that from Mr. Green and he was to advance Mr. Green a certain amount of money in consideration of the six-acre tract, to help support Mr. Green in his old age. And he testified to the amount of those advances that he gave to Mr. Green from time to time of this transaction to the time of his death. And it is our position or contention that the heirs in this action are in no better position than Mr. Green would be if he were the plaintiff; and if he were

here we think in equity he should reimburse us for these moneys which we paid out for his support and keep during this time.

THE COURT: Did Mr. Niday testify to any specific amount?

MR. FRASER: Yes. There was an itemized list filed here of those amounts. That is one matter.

The other matter the Court probably has ruled on, but we would like to present it again in this final hearing, and that is, Mr. Niday testified that the consideration of the larger deed was for services he had rendered Mr. Green as attorney, for which he had never been paid, and that Mr. Niday claimed he should be entitled to some attorney's fees in that matter; however, to present that again, and have a final ruling of the Court upon that.

The only other matter I can think about, and there was no evidence presented on that, and that is the commission on the sale of this land and the amount which Mr. Niday would be entitled to for acting as agent, you might say, in taking care of this property, in other words, in procuring renters, collecting the rents, overseeing the property. And I don't know—we told Mr. Montgomery when he was here before what we would consider a reasonable amount for that, and I don't know whether he desires to dispute that amount or not. But I

think those are the only questions I can think of at the present time for the Court to pass upon.

MR. MONTGOMERY: Now, if the Court please, at a time when Your Honor was absent from the city, we came here and held a conference with Mr. Fraser and Mr. Niday, acting in accordance with the Court's suggestion in the opinion in this case, for the purpose of arriving, if possible, at some basis of settlement in accordance with the directions which this opinion had given, but for some unknown reason we were unable to get together on any of the propositions. It was first contended, as already suggested by Mr. Fraser, that the opinion did not intend to exclude the $4,000 attorney's fee which Mr. Niday claimed that he had rendered, for services which he had rendered to Mr. Green. That was presented on the trial as part of the consideration of the conveyance, and the decision of the Court expressly eliminated that $4,000 from consideration, by stating that in your honor's opinion there was no intention of presenting a bill for those services. That was likewise your honor's suggested finding at the close of the trial. When that amount again appeared in the statement which Mr. Niday presented to us for settlement we said that we could not agree upon that, and it seems to me that if your honor conforms to the findings and statements made in the decision

there is nothing to argue upon that question, because the matter has been adjudicated.

As to the second proposition advanced by Mr. Fraser, which was likewise advanced in that hearing, a question is now raised as to the consideration for the first deed. That matter was presented completely upon the trial, and upon that matter your honor expressly made a finding as follows: "As to the first deed, he explains, in substance, that when the settlement was made with creditors he induced them to release this small tract, and thereupon Green deeded it to him, with the statement only that he, Green, would have to call on the defendant for money from time to time. It does not appear that any price was fixed, or what amount, if anything, was ever paid by defendant on account of the transaction, or that the defendant ever recognized that he was under any legal obligation whatsoever; nor is any reason given why the actual consideration was not specified in the deed." That is the identical question which counsel again raises this morning, and was raised at the time of our endeavor to come to a final adjustment. So it seems to me that both of those questions have already been disposed of upon the main hearing, and would not be proper claims to now present in connection with the accounting.

In addition to those two claims, Mr. Niday also presented at this hearing which we held claims,—

at the time he had a typewritten statement of certain claims which he wanted considered. I asked to retain a copy of it, but he said it was not complete enough and he would furnish it to us, but it has not been furnished in the meantime. That statement presented at that time presented claims for personal funds which had been advanced, according to Mr. Niday's claims, to Mr. Green,—nothing, so far as I could see from the statement, in any way connected with the real property in controversy. The estate has been probated here, claims have been filed, in Mr. Green's personal estate, and individual sums of money furnished by Mr. Niday it seems to me that is the proper place to present them, and it seems to me they are in no way involved in this suit. We therefore objected to any long series of items of a personal account that properly belonged in the Probate Court.

The next question that was presented and upon which there was no dispute was the question of the commission to be allowed Mr. Niday for the sale of the property as indicated in Your Honor's opinion. They fixed a certain amount, as I remember, $1500, as a reasonable commission, and I had no objection to the amount as fixed, that is, that would be charging half to the plaintiff in this case, insofar as the amount was concerned, but I did desire to suggest to Your Honor in that connection at this hearing and upon this proposition that there

was no agreement at that time, which I don't blame the other side for, that in the event Mr. Niday was allowed a commission for the sale of this real property, together with compensation for what he claimed to be the expenses incurred in overseeing the maintenance of the property, that the plaintiff in turn should, as a matter of equity, be allowed reimbursement for necessary attorney's fees which she has been compelled to pay out in order to recover her interest, together with a large expense which she has been put to in coming here to Boise, that are not ordinarily recoverable under the statute; and in connection with this hearing I desire to simply present a claim in that particular. It seems to me that in equity and good conscience, if he is allowed a commission for selling that which, under the theory of our case, was obtained by undue influence, that the heirs should at the same time be reimbursed for the expenses to which they have been put, at least the plaintiff in the case. And likewise in that connection there is a very recent decision from the District of Columbia that I found in the last issue of the Federal Reporter, wherein the Court of Appeals in affirming the lower Court charged the grantee, who in that case had obtained a deed by assuming a mortgage of $4000 and paying an additional sum of $1500 cash, the property being of $7,000 in value, that in the instance where the deed was set aside the Court charged the gran-

tee with the reasonable use of the property. There was no question presented there as to commission for sale, although the property had been sold; but he was likewise charged with use. And therefore in this connection I desire to present this feature of the case, owing to the fact that it was not discussed by Your Honor in your opinion, as to our right to recover a reasonable attorney's fee, together with expenses that the plaintiff has been put to in coming to Boise, and a reasonable amount for the use of the property during the time the defendant had it.

I think that those items which I have mentioned constitute the only matters of dispute between us. But the item of $4000 as an attorney's fee, the item of $500 in connection with this first deed, as I suggest, was thoroughly and completely discussed upon the trial, and it seems to me have been very completely covered by the findings already made, and the present attempt would be simply an endeavor to review those findings. And in the next place certainly Mr. Niday could not be allowed a claim in connection with the real property which dealt solely with the personal estate of the deceased and is in no way connected with the management of the real property. Even in this claim as presented to us there was either a debit or a credit for moneys collected or advanced or something out of the Satterfield estate. I asked for an

explanation of that and was unable to obtain it for some reason, and it was suggested that I write to Mr. Satterfield, and I did that, and received a reply that Mr. Green evidently received an income from the Satterfield estate up to about two months before his death, the exact amount of which he didn't know. If Mr. Niday is going to present a claim for the handling of the Satterfield estate certainly the heirs should be credited with the amount received for Mr. Green. It seems to me that all of these matters,—the first two have been adjudicated—the personal claim is not properly in this case, and as against the commission and the other allowances, the plaintiff should be allowed her reasonable expenses and attorney's fees in conducting the present litigation.

MR. FRASER: If the Court please, in answer to counsel, in regard to the second proposition, that we should be entitled to credit for the moneys we advanced to Mr. Green after the conveyance of the six acres, to the time of his death; it was impossible for us to present a claim to the executor, for the reason that until this deed was set aside we had the property; and under Mr. Niday's testimony the consideration for the deed was these very advances that were thereafter made, and as long as we held the property we could not present our claims to the probate court or against the estate of Mr. Green. In the case which counsel read from

there they made an account for the value of the use of the property. In the case at bar Mr. Niday is charged, under the former opinion of the Court, and he has accounted in this case, for all the rents, issues and profits of the estate which he received during that period of time. He has in other words benefited nothing by reason of holding this land in his name up to the present time if he accounts for the rents and profits which he has testified to having received. If Mr. Niday had gone on to the farm and lived on there, and had the benefit and sold the produce and had the use and the occupation, but in this case he did not do so; the premises were rented, and the rents have been accounted for in this hearing already; so the conditions are not similar at all.

On the matter which he refers to, the Satterfield matter, as I recollect, he claims there was an account presented to him when he was here before, having reference to that, and as I recollect it, it was this, that Mr. Niday collected for Mr. Green from Satterfield, or other matters, small amounts of money, and those amounts he gave credit for in the statements we submitted to counsel. In other words, we claimed as an offset, those amounts were deducted, these amounts which we collected from the Satterfield estate.

THE COURT: Where is this statement, gentlemen? Was it introduced?

MR. FRASER: It was introduced in evidence.

MR. NIDAY: It wasn't introduced in the exhibits. It was testified to.

THE COURT: I know you testified at some length to the handling of the farm, and from year to year what the result would be after charging interest and crediting rent, etc., but I don't remember anything about these other items.

MR. NIDAY: That was in relation to the profits of the farm. That testimony was for the purpose of showing that the value of the farm at $15,000 was an excessive value, because the amount I put into it was a losing proposition. But the Court will remember I testified that I had advanced of my own funds to Mr. Green on account of these lands and other transactions twenty-eight hundred and some dollars and was entitled to certain credits. Those credits, however, were not put in. The evidence, if the Court will pardon me, or the statement of counsel concerning the Satterfield matter, grew out of this. These funds or moneys were advanced from time to time to Mr. Green, covering practically the period of time when he came over here to the time of his death, and were his living expenses. And these Satterfield matters were moneys that I had collected for Mr. Green for commissions on services that he had rendered the Taylor and Satterfield estate as administrator of that estate, in selling lands and handling the estate of

Taylor and Satterfield. Of course I was advancing money all the time, and when those moneys came in they were merely charged up against the moneys I had advanced.

THE COURT: Of course my recollection is probably at fault, but I don't remember any testimony at all upon that point.

MR. NIDAY: I think the Court is correct in your memory as to the Taylor and Satterfield items, but the $2800 item, that I had advanced, is in the record.

MR. MONTGOMERY: My recollection is the same as Your Honor's, that there was no testimony as to the amount of money advanced. In fact, Mrs. Acuff testified that the children helped contribute to the support of Mr. Green.

THE COURT: Yes; I remember she testified that there was some sort of an understanding that each one of the children were to contribute so much.

MR. NIDAY: As a matter of fact, none of them did.

THE COURT: Mrs. Acuff testified that she had contributed small amounts, but I don't remember that there was any other testimony upon that point, and I don't think there was any testimony as to what others contributed, except in a general way she said some were able to and some did not. Now my attention might be called to the precise status of the record upon this particular

point, but as I remember the testimony of the defendant touching the circumstances surrounding the execution of the second deed, it was simply to the effect that Mr. Green offered to turn over the land to him because if he didn't get it Mr. Dewey would, that he had rendered attorney's services; there was no reference at that time to any moneys that Mr. Niday had advanced, if he did advance any. or that he was to advance. Now, if that be the case, I hardly see how I can take such an item into consideration at the present time, because there may be a great many equities as between the several heirs. Now if my memory is at fault in that respect, I shall be very glad to have it corrected. I don't recall any reference at all in the testimony in connection with this except the apparent belief on the part of Mr. Green that he was going to lose the land anyway, and that Mr. Niday had rendered him some legal services.

MR. FRASER: If the Court please, I may be mistaken, but my recollection is that Mr. Niday did testify as to the amount of money which he advanced under the conveyance of the six acres.

THE COURT: That may be, although I don't remember that.

MR. FRASER: I may be mistaken, but I have a recollection that that is in the record in Mr. Niday's testimony. But I would suggest this, that this matter of accounting would only be pertinent

when the Court should first decide to set aside that conveyance, that if there was no testimony at all upon that question in the prior hearing we would be entitled to an accounting, entitled to make our proofs as to our credit and offsets in the accounting proceedings; in other words, we would not be barred. We might have tried the case solely upon the theory first that the conveyance was a valid conveyance, and if the Court had so held there would be no necessity of putting in any evidence at all on the question of the accounting. But I have a very strong recollection that Mr. Niday did testify as to the amount of moneys he advanced under the six acres. The stenographer probably could turn to Mr. Niday's testimony.

THE COURT: I was going to say, touching the first deed, that it is in my mind that—well, there is such an expression in the opinion, I think, that there was some statement on the part of Mr. Niday in his testimony that Mr. Green remarked at the time the conveyance was made that he would have to call upon him for funds. We might refer to the record for the purpose of seeing whether or not there is any evidence at all as to that amount. If there is such evidence, possibly it should be considered. That is about the only matter concerning which I have any doubt, gentlemen,—the first item suggested by Mr. Fraser, the matter of advances on account of the transfer of the six acres,—and such

advances could only be considered by way of reducing or wiping out the value of the six acres. As to the attorney's fees, I don't think it is necessary for me to say anything further. It is wholly incredible to me that there was any intention to charge for these services, in view of the state of the record and the testimony. I think we are all aware of what is more or less a common thing,—referring to my own experience, and I think perhaps each one of us, if we have relatives, know that we are rendering services all the time that way for which we don't expect to charge and the relatives don't expect to pay; and perhaps in turn we get services for which we don't intend to pay,—if there is a professional man in the family—it may be a lawyer or a doctor. And I am so fully satisfied that Mr. Niday didn't expect to charge for these services and Mr. Green didn't expect to pay for them that I have no disposition to reconsider the point.

I understand you to say there is no disagreement about the commission. I was on the point of putting in the opinion the rate of commission, because there is a sort of an understanding I have outside of court that five per cent is the ordinary going rate here.

MR. FRASER: That is the amount.

THE COURT: But I think perhaps I thought I ought not to take judicial knowledge of the fact, although it is a well known fact.

Now as to the matter of some compensation to Mr. Niday for his supervision, I am not sure whether you have disagreed about that or not.

MR. FRASER: We suggested when Mr. Montgomery was here, considering the value of this property and the number of trips, and collecting the rents, we thought $300 a year would be as low a price as you could get any real estate man to handle that property for and look after it and rent it and collect the rents.

MR. MONTGOMERY: It did seem to me that $25 a month, considering the fact that during all this time—he wasn't out there operating it—he claims to have leased it independently,—and so far as I can see all he had to do was to make the lease and collect the rents under the lease, and no further supervision, and it seemed to me that $25 a month for services of that character was sufficient.

THE COURT: What was the length of the period?

MR. MONTGOMERY: The first deed was December, 1914, and the second deed October 1, 1915. That would be from October 1, 1915, to the date it was sold, which would be December or January,

1918, the date of the deed to the present occupants, if I remember correctly.

THE COURT: Practically three years.

MR. MONTGOMERY: Deed from Mr. Niday December 14, 1918.

THE COURT: A little over three years, then.

MR. MONTGOMERY: A little over three years. I would like to suggest, too, in connection with the objection, the statement I made a moment ago, that under such circumstances the defendant, by virtue of having the possession of property, having the right to sell the same at any time and do what he wanted with it, would logically entitle the plaintiff to a claim for the reasonable use by the defendant, and it seems to me that is a reasonable privilege in that particular. That suggestion I take from this recent case of which I spoke, wherein just such an allowance was made, in view of the fact that a deed had been procured under very similar circumstances.

THE COURT: Wouldn't the use be covered by the rental? Isn't that the kind of use for which the party would be charged?

MR. MONTGOMERY: Yes. But there was a brief period of time that the property was not under rental, wasn't there?

MR. NIDAY: There was no time after I had the property that I in any way had the use of it.

THE COURT: No. I so understand. Even

though there was a brief period that it wasn't under lease, if he didn't occupy it, if he didn't have any benefit out of the use of it, he couldn't very well be charged with the use.

MR. MONTGOMERY: If course that would likewise prove the fact that he had no particular difficulty with the property for the maintenance of it, that he simply turned it out and drew in his rental and had no burdens to carry or work to perform in connection with it.

THE COURT: I think, gentlemen, that it is somewhat difficult to get at it precisely, but I think I will make an allowance of $300 a year for an even three years, which would be $900. I doubt whether you could get anyone to take care of property, that is, a competent person, to take care of property of that kind for that length of time for less. Take into consideration that there was a feeling on the part of Mr. Niday that he was handling it for himself, and you doubtless got better service in that way than you would have gotten from just the ordinary agent. I don't know what a real estate agent would have handled it for; there is no evidence upon that; but taking into consideration all the circumstances of the case, I don't believe that would be out of reason. So I shall make an allowance of $900 on that account.

MR. MONTGOMERY: That would be, of course, on the theory that the plaintiff be charged

half of the allowance?

THE COURT: Of course, all of these charges would be charged against the property as a whole, commissions and everything, and the plaintiff here would only pay her proportion, whatever that may be. I don't see how, Mr. Montgomery, I can allow you attorney's fees. Each party has had expenses. It isn't a case where I have been able to find such positive or actual fraud as would justify me in penalizing the defendant, and hence I think I shall let the costs and expenses follow the ordinary rule.

That would leave but the one question, gentlemen, and that is as to whether or not the record is such that I can allow, as against the value of the six acres, any advances made by Mr. Niday. Now if you can get the reporter to read to me such parts of the record as you think bear upon that—

MR. FRASER: I would ask the reporter to look up Mr. Niday's testimony as soon as he can.

THE COURT: As I understand, it is agreed now that such testimony as there is, that is, evidence as there is, is the oral testimony of Mr. Niday, that no statement was put in?

MR. MONTGOMERY: Just as a matter of information, if the Court please, for the simple reason that when we get through we can't seem to agree even upon the Court's decision as rendered,—I understand personal allowances or advances of

which Your Honor speaks now would not apply in any sense to the second conveyance?

THE COURT: Not at all.

MR. MONTGOMERY: So if an attempt is made to apply to the whole transaction, those should be excluded?

MR. NIDAY: That is correct. We don't claim that they have any connection.

MR. FRASER: This transaction can't be considered as an entity, if the Court please, for the reason that there was a period of one year between the convyance of the first and second pieces of property, and the six acres was conveyed a year prior to the conveyance of the balance of Greenhurst. He did not assume any mortgage against the six acres or pay it off, and he testified that the consideration for that six acres was that Mr. Green expected him to advance some money for living expenses, and Mr. Niday's testimony is clear and distinct that that was the consideration for the six acres.

MR. MONTGOMERY: In connection with dealing with the property as an entity, I will just call the Court's attention to—there was an allegation in the answer—there is an allegation in the answer filed in the present suit, dealing with the property as an entity, and the early part of this evidence which was read before Your Honor came in likewise dealt with it as an entity.

"Defendants deny that at the time of the execution and delivery of the deeds mentioned in the bill of complaint the real property covered thereby was of the actual and reasonable value of more than thirty thousand dollars or of any value whatsoever in excess of fifteen thousand dollars."

That isn't the allegation. That paragraph denies that the property was worth in excess of $15,000, "and these defendants deny that said J. L. Niday did not pay to said R. E. Green any valuable or adequate consideration for the real property described in said deeds."

And the answer throughout, in dealing with the allegations of the complaint, deals with the conveyances as an entity, and as I say, the defendants' own evidence has dealt with it as an entity from the very inception of the testimony offered here and it seems to me that any attempt at this juncture to segregate it—there is no claim of Mr. Niday that these attorney's services were rendered in consideration for the 206 acres alone. It was claimed that they were rendered for the two deeds, the one in 1914 and the one in 1915, and I cannot see any logical theory upon which the defendant can now claim the right to segregate these transactions at this juncture of the proceeding. It seems to me, for that reason, these advances should not be allowed.

THE COURT: I don't believe I quite understand your position, Mr. Montgomery. You say the property has been treated as a unit. Of course, for the purpose of ownership it was, after the delivery of the second deed. Apparently Mr. Niday claimed to own both tracts, and from that time on doubtless treated them as a unit. But as to the matter of attorney's fees to which you have just referred, that came up only in connection with the second transfer, as I remember; but Mr. Niday in testifying here, it is true, testified to the value as an offset to the value of the property as a whole. I have found that the whole matter of attorney's fees is an afterthought.

MR. MONTGOMERY: But the point I make, Your Honor,—and the difficulty in taking this individual portion and reading it separately from the rest clouds the point I am trying to make—Mr. Niday, in his testimony, in dealing with the entire subject of the litigation, by dealing with the subject of the attorney's fees in relation to the entire transaction, that is, that the consideration for the entire deal, the purchase of Greenhurst, was the assumption of the mortgages,—when counsel says there was no mortgage on this six acres counsel is mistaken; there was until November, 1914, if I remember correctly, when this separate deed was made to Crawford Moore, was the first that any attempt was made to segregate this mortgage from

this six-acre tract. And Mr. Niday has claimed throughout, from the first inception, that he assumed the mortgages on the entire 212 acres, given to Mr. Dewey.

THE COURT: I haven't so understood it, Mr. Montgomery. I don't understand that Mr. Dewey ever had any mortgage on the six acres.

MR. MONTGOMERY: Yes, he did, Your Honor.

MR. NIDAY: I think the record shows that he didn't.

MR. FRASER: You are wrong in that, Mr. Montgomery. Mr. Dewey never had a mortgage on that six acres.

THE COURT: Mr. Dewey's mortgage never did attach to this six acres.

MR. MONTGOMERY: I have the abstract right here, Your Honor.

THE COURT: I don't see how any other construction could be put upon Mr. Niday's testimony. I may be wrong about it, but the testimony just read would indicate that.

MR. MONTGOMERY: At the time of that transaction.

MR. FRASER: That was prior to the deed to Mr. Dewey.

THE COURT: You mean that subsequently the Dewey mortgage covered the six acres?

MR. MONTGOMERY: No. The Dewey mort-

gage existed long prior to November, 1914, and at that time the Dewey mortgage existed on the 212 acres.

MR. NIDAY: No, it never did.

MR. MONTGOMERY: That is my understanding of it, but I will have to check the description.

MR. NIDAY: That is a mistake.

MR. FRASER: Here is the mortgage itself. It says 206 acres more or less.

MR. MONTGOMERY: What is the date of that mortgage?

MR. FRASER: The 31st day of January, 1913.

MR. MONTGOMERY: What is the amount of that?

MR. FRASER: $1683.

MR. MONTGOMERY: The other one.

MR. FRASER: The first one, the sum of $10,000, said premises containing in all 207 acres more or less. The $10,000 was on it, and then they put on a mortgage for $1600, which is the interest on the $10,000.

MR. MONTGOMERY: If that is correct, I am mistaken.

MR. FRASER: The original mortgages are here for your inspection.

MR. MONTGOMERY: What was this six acres taken out of when it was released from the mortgage?

MR. NIDAY: From the lands that Volkmer had.

MR. MONTGOMERY: It was mortgaged then at that time?

MR. NIDAY: To Volkmer, yes. That was in 1914.

MR. MONTGOMERY: When this was extracted from that mortgage who paid the interest on the portion that applied to the six acres?

MR. NIDAY: The property that was covered by the Volkmer mortgages was all conveyed to Mr. Moore except the six acres.

MR. MONTGOMERY: Mr. Moore then gave back the six acres to Mr. Green as a gift?

MR. NIDAY: No; it was never conveyed to him.

MR. FRASER: Mr. Moore released as far as the six acres was concerned.

MR. NIDAY: He only got a deed for the balance, without the six acres.

MR. MONTGOMERY: Likewise and in connection with that testimony, if the Court please, there is a letter which was introduced in evidence here, written by Mrs. Niday herself and signed by Mr. Niday, which would be in conflict with the evidence just read there, to the effect that Mr. Green had no other source of income or no other funds.

MR. NIDAY: Signed by me?

MR. MONTGOMERY: Signed in your behalf, and Mrs. Niday testified that it was likewise writ-

ten on your behalf. The letter itself states here that Mr. Niday was present with her, helping her write this letter, and it is signed Niday and Mollie, and Mrs. Niday testified that she did write it in the presence of Mr. Niday, and Mr. Niday did not deny that upon the witness stand, and this letter says, "When father came to Boise he had $500 that was put in certificates, $100 each, and was used in paying off his personal expenses as long as it lasted, which was not long. This was all by check, and I have the record." So apparently Mr. Niday's statement in that particular is contradicted by the record itself.

MR. NIDAY: I think, if the Court please, that we have testified that right along, and I stated it in the record myself, and it is in the record.

MR. MONTGOMERY: But the statement now advanced is that Mr. Green had no money, and he offered you this deed, as I understand it, because he might need money, and for that reason you agreed to make advances on the six-acre tract.

MR. NIDAY: He owed more than that then.

MR. MONTGOMERY: Of course, if the Court please, even in spite of this testimony, this argument, we still get back to the main issue of the case, that this deed of 1914 is in exactly the same category as the deed of October 1, 1915, a deed from an old gentleman to his attorney in a confidential relation, with no specific agreement upon

the part of the attorney to support him during any period of his life, augmented by the further testimony that the other children had agreed to and did contribute to his support, and it doesn't seem to me that the rule of law can be changed by the additional statement of the defendant that at that time Mr. Green stated to him that he might need some money and he would give him a deed. The same rule would apply to the one deed that would apply to the entire transaction, and when the record is taken as an entity I don't see how it can be claimed, after reading it as a whole, that there was originally any attempted segregation, that the thing was dealt with on the basis of an entire transaction, just the same as Mr. Niday was asked on cross-examination why he withheld the deed from record, and he said it was to get a loan on the property. Both of them were withheld from record. And if the theory now advanced is correct, that there was no other object in withholding the deed from record, the same rule of law applicable to the original case is in no way changed by this statement, as far as I can see, except that the witness now claims that he should be entitled to certain advances for money which was actually advanced.

THE COURT: There would be no distinction to be made between this deed so far as the legal considerations are concerned and the other deed, with this exception, this possible exception, and that is

as to whether or not the Court should grant relief to the plaintiff in this case without requiring equitable treatment of the defendant, that is, under the facts as I have found them to be, this was not a valid transaction, referring to the first deed, for two reasons, one, that Mr. Green was mentally in such a condition that he could not be regarded as competent to transact business generally, I mean in the more important items of business, and the other that there was no agreement as to price, the price to be paid for the land. Now if there had been a definite agreement as to the price to be paid for the land, and it had been reasonably adequate, I am not at all sure that the transaction could be held to be invalid, for, as has already been stated, I was not able to hold that Mr. Green was totally incompetent. He was competent to transact certain business. There was a mental weakening, and this would have been a very small matter, six acres of land saved out of a sort of a wreck, the saving being due in part at least to the service and interposition of Mr. Niday. Now, if at that time, Mr. Green had said to Mr. Niday, "I shall be in need of four or five hundred dollars, whatever the land is reasonably worth, and you will take it and pay this money to me from time to time as I need it," I am inclined to think that the transaction might be sustained, but according to the testimony there was no such agreement, sim-

ply some sort of a general statement that he, Mr. Niday, could take title to the land, and Mr. Green would require some advances. But even if a person were wholly competent, such a transaction would be voidable, to say the least, for the agreement would be lacking in mutuality. But I was going to say, here is the situation here: Assuming the transaction to be invalid, could Mr. Green have avoided the deed without offering to do equity? And the heirs here, of course, would be in no better position. My impression is that Mr. Green could not, if he had admitted to be true what Mr. Niday has testified to, title taken in consideration of certain advances to be made, he might say this agreement was void for want of mutuality, no obligation on Mr. Niday to advance any more than a dollar or five dollars or twenty-five dollars, as the case may be, which would be a totally inadequate consideration, hence I want the deed set aside, and Mr. Niday says, "I have already advanced you $100 on account of it," and Mr. Green says, "Yes, I know that, but that doesn't change the situation." Would a court of equity listen to Mr. Green's plea for relief if he were unwilling to return to Mr. Niday what he received under this voidable instrument? That is the real situation.

MR. MONTGOMERY: I appreciate Your Honor's suggestion there, but I would like to add one thought in connection with that, that insofar as

the heirs are concerned, looking at the question now suggested from the broad viewpoint of the application of principles of equity rather than the technical construction of the immediate transaction: It would undoubtedly have been Mr. Niday's duty at the time Mr. Green made this suggestion to him to say, "If you have six acres of unincumbered land and you have no property of any kind out of which to realize any income, then instead of giving this six acres to me, some effort should be made by you to sell this six acres," especially in view of the fact that at the time, as shown by the undisputed record, he did have $500 in the bank from which he could draw for various purposes. Furthermore, certainly even counsel for the defendant cannot contend that, taking the witness's own statement that he paid Mr. Green $2800 for five acres of land,—that is what it is boiled down to, if we take his statement to be true,—Mr. Green gave him six acres, and on that six acres alone he advanced him $2800. The vice of the position of the defendant, the very fact shows itself that he wasn't dealing with the six acres of land, even though he attempts to so state, but if he did advance $2800 it must have been in relation to the entire transaction. So it really comes down to the question to what extent the Court, as a court of equity, will take the word of the defendant, when the very circumstances under which it is stated, the lips of the one being sealed by

death, the very circumstances would indicate a diametrically opposite situation, owing to the fact that the now claimed advances of $2800 were far in advance of the value of the six acres; and it was Mr. Niday's duty when dealing with a client under such a situation to say to Mr. Green, "No, it will not be becoming to me under any situation to take your property which is unincumbered, but I will aid you in getting money on it for your own use." It reverts back again to the original situation presented to Your Honor, that the six acres comes in as an element of the entire transaction, and that even though advances were thereafter made, after the conveyance of the deed, if counsel's statement is true, that it appears from the face of the record that Mr. Green at that immedite time was not destitute of property, and I can see myself no reason for changing the rule and its application with reference to that. I agree with Your Honor that if a specific contract had been made, a reasonable one, if he had said to Mr. Green, "I will give you $500 for this six acres of land," and he came on the stand and testified that he did, and produced the check, which would be a reasonable compensation possibly for the six acres, so that the contract would look to accord with a reasonable contract, then the suggestion made by Your Honor that of course Mr. Green would be in a position where at least he should turn back the $500, would be all

right. But when we come to an unreasonable proposition, after the defendant has gone on the stand and reduced the value of the 212 acres down to $15,000, then to advance an argument that he advanced $2800 on six acres, wouldn't appeal to the conscience of a court of equity.

MR. FRASER: Counsel seems to think that the generosity of Mr. Niday to his father-in-law in his old age should militate against Mr. Niday. Here was his father-in-law in the latter years of his life, without any property or means of support, and the fact that he advanced more than $600 should not militate against his claim for reimbursement. He has testified to that consideration for six acres. It was a year before the other deed was given, and unless the Court absolutely refuses to believe the testimony entirely and say that Mr. Green deeded this for some other reason, which the record does not disclose,—I think the Court has stated the rule exactly, that he who comes into a court of equity must come with clean hands. And if Mr. Niday, according to counsel's theory, had refused to advance Mr. Green any more than five or six hundred dollars, it would have been all right for the Court to allow it, but because he did see fit to aid his father-in-law to this extent, therefore he should be denied any return for the moneys he expended. I do not believe that is equity, and I do not believe it is the law. We claim that under the principles

of equity we are entitled to be refunded to the value of that land.

MR. NIDAY: If the Court please and would bear with me just a moment in this matter. Counsel has seen fit here to enter into a dissertation upon propriety. The scene has shifted since the year 1914 and the year 1920 or even 1918. At that time Mr. Green came over here a broke man. As he said himself, he didn't have a dollar or know where the next meal was to come from. Subsequent to that he had a sale on his ranch and got a little bit of money. He owed more than that amount of money that was left. That instead of these other heirs offering to do anything, there wasn't one of them that offered to turn a hand to help him. The testimony so far as that is concerned—this is out of the record—so far as that is concerned, there wasn't one of them contributed a dollar to his support. They did give a little money to Mrs. Wager. And at that time I put it all up. At that time they said Niday was a prince. It is just because of the change of conditions that brings about the condition today. The fact is that at that time they all realized that Mr. Green was a broke man. Because of a change of conditions, property enhancing in value, and the property chancing to be sold at a fabulous price in my judgment, the scenes shifted. As a matter of fact, when I ad-

vanced this money to Mr. Green, if it had been $10,000 and he had lived long enough to need it, he would have gotten it. Mr. Green knew it and he knew his friends. If he was alive today there would have been a very different atmosphere before this Court. When they say they helped Mr. Green they know it is false, and the man that sits there is one of them too.

THE COURT: No, Mr. Niday; I am indulging you—

I think I will follow the general principle suggested, gentlemen. If you have any doubt—if you require it, Mr. Montgomery, I will direct Mr. Niday to show in detail the disposition of these moneys, that is, for what purposes they were paid out and when and under what circumstances. While there is some merit in your suggestion that it couldn't have been that Mr. Niday paid out $2800 on account of the consideration for this six acres, still, under all of the circumstances, a part of that might be very well have been paid out by virtue of this agreement. Money might have been paid out by reason of a feeling of kindness or the relationship existing between the two as friends and relatives by marriage. In other words, the first advances might have been on account of the deed, and then the others might have containued. As I say, the record is not very clear upon the subject. If you desire to further inquire into it I will direct Mr.

Niday to produce such papers and books as you want and have a further hearing upon it.

MR. MONTGOMERY: Would that be with reference to the entire $2800 or the value of the—

THE COURT: Well, there is involved here at present only so much of the $2800 as would be the value of the six acres of land, because it is understood that this question doesn't extend to the 206 acres at all.

MR. MONTGOMERY: I would like, in connection with that inquiry, if the Court please, to likewise have Mr. Niday produce the records of Mr. Green's dealings at that time with the Satterfield estate, that is, during the entire period of time it now develops that Mr. Green received an income, and if this is going to be allowed against that six acres I think that same inquiry should extend to that, and the deeds that had been given as I understand by Mr. Green.

MR. FRASER: I would ask that that be continued until tomorrow morning. I desire to finish that hearing and permit the witnesses to go back to Denver and Salt Lake that are now here in Boise and before the Public Utilities Commission.

MR. MONTGOMERY: If we could save any time, what would be your opinion if we didn't stop to go through those records as to the value of the six acres at that time, as to what proportion of the $2800 would apply to that?

MR. FRASER: Just a proportionate value, I suppose, of what the whole ranch sold for.

MR. MONTGOMERY: What would that amount to?

MR. NIDAY: If it comes down to that question—

THE COURT: Proportionately the amount is about $900; that is, the land was sold for not quite $150 an acre, as a whole,—between eight and nine hundred dollars.

MR. MONTGOMERY: Then the inquiry—as to seeing if Mr. Green received income from the Satterfield estate. You are asking for a general accounting, and he received moneys in behalf of Mr. Green, that belonged to Mr. Green personally.

MR. NIDAY: Mr. Satterfield sent me a copy of the letter written to Mr. Montgomery: He doesn't state that I have got the record. He states that it was filed with the probate judge. I wrote Mr. Satterfield at once that he was in error about that, that Mr. Green was simply an ancillary administrator, and that the papers had all been forwarded and filed with him, and he was the one that has them.

MR. MONTGOMERY: Where did you get the source of information of the papers you presented to me last time?

MR. NIDAY: I have already testified that I collected them and they came through me. I don't pretend to say now, and didn't any time, as

to how much Mr. Green has got, although I could almost swear that what has been stated here is the amount he got and all he got, but what I say is that these amounts were collected by me, and he has been given credit for them.

MR. MONTGOMERY: What I want is the history of that. It was all in a lump sum.

MR. NIDAY: There are only two items.

MR. MONTGOMERY: Haven't you the original record?

MR. NIDAY: Yes, I have that record, I think.

MR. MONTGOMERY: I would ask only for an inquiry as to the $900, with the same inquiry as to the receipts. Of course if you credited him with the amount received from the Satterfield estate, all right.

MR. FRASER: That, of course, was accredited.

THE COURT: A proportionate value should be allowed, I think, unless there is some objection to the manner of getting at the value of the land.

MR. MONTGOMERY: I suppose counsel has no objection to the course suggested as to the method of apportioning the value.

MR. NIDAY: If counsel means that the items that I collected for Mr. Green be taken from the total of the moneys I advanced, that is what I mean, and that is, of course, what would be done. I advanced him $2800 and I collected certain sums, and he would be given credit, of course.

MR. MONTGOMERY: When it comes to the question of figuring, counsel will claim he advanced a certain amount and collected a certain amount. The amount of his advances would be, of course, only the amount left after the collections were subtracted.

MR. FRASER: The only dispute now seems to be that you desire us to take the amount collected from Mr. Satterfield from the $900.

MR. MONTGOMERY: From the $2800, and then apportion the balance remaining to the six acres.

MR. FRASER: That would be all right, I guess. It wouldn't amount to very much either way.

MR. MONTGOMERY: I think that would cover every question then, unless there is something else we do not agree about.

MR. NIDAY: There is a question here, if the Court please. When we went to convey this property there was a defect found in the title. I don't know—I presume that is outside the record. There was no testimony given on that matter in the record. And there will have to be an action brought to quiet title. I know the title is defective, and I agreed to bring it. I didn't agree to do it at any time, but it will have to be done.

MR. MONTGOMERY: I suppose that can be taken care of.

MR. FRASER: That was presented to you when you were here before.

MR. MONTGOMERY: When the decree is entered the joint owners can institute the suit. We might agree—

MR. FRASER: I think perhaps we can agree on that.

MR. MONTGOMERY: I don't see why that should go into this accounting.

With that final word as to the accounting, I would like, on behalf of the plaintiff, the record to show an offer of proof on behalf of the plaintiff in connection with the plaintiff's claim presented here this morning for expenses incurred in the institution of the present litigation. I would like to offer to prove in the formal testimony presented by Mr. J. A. Graef that in the various trips from Portland to Boise, Idaho, on behalf of the plaintiff, for the purposes of negotiating settlement of the present case and of conducting the litigation, there has been expended by way of actual outlay the sum of $413.64, and that there has been presented and paid by the plaintiff to Messrs. Platt & Platt the sum of $1500 as a reasonable attorney's fee for conducting the present litigation, both of which items are now offered by way of proof in connection with the accounting, as offsets to the claim of the defendant for a commission and fee for expenses in conducting the maintenance and opera-

tion of the property in controversy. And I desire likewise to have the record show a request for an exception to the action of the Court in refusing to allow these items as an element of offset.

MR. FRASER: The record can show that the counsel for the *plaintiff* objects to the allowance of these items as improper and not such items as should be allowed, as shown by the record in this case, and that it would be inequitable to allow the same against the defendant.

THE COURT: The objection is sustained. You may have an exception.

MR. MONTGOMERY: With that, I think we can proceed to the determination of our accounts and the preparation and presentation of the decree.

MR. FRASER: I think so.

MR. MONTGOMERY: I will prepare the decree, if possible, this afternoon, and present it to Your Honor.

THE COURT: You don't desire to go into the matter of the account any further, then?

MR. MONTGOMERY: Not other than as suggested. I presume that can best be determined when I check over Mr. Niday's items.

THE COURT: Yes. I thought perhaps after seeing the books and records and itemized statements you might—

MR. MONTGOMERY: If any further question arises I will ask that it be—

THE COURT: The matter will be continued then until tomorrow morning.

Accordingly the matter was continued until 10 A. M., Tuesday, Nov. 30, 1920.

10 A. M., Tuesday, Nov. 30, 1920.

MR. MONTGOMERY: If the Court please, I do not desire at this time to indulge in unnecessary repetition, but in an involved accounting such as the one here at bar, where our time is so short, we have received the accounts only yesterday, and checked them last evening, and it seems rather difficult to get to a complete understanding of the Court's ruling. And therefore there are two or three isolated items that I desire to present in connection with the Court's ruling, and I think it will probably be more convenient if I present one at a time and determine them as they have arisen.

Before proceeding with such a statement, however, a stipulation has been made between the parties for the purposes of the decree, which I think might properly at this time be presented into the record, to the effect, as I understand it,—and if I am in error you can correct me, Mr. Fraser—that prior to the commencement of this suit and prior to the conveyance of the property involved in this suit, the two sons of R. E. Green, deceased, George L. Green and John M. Green, conveyed to the de-

fendant J. L. Niday all the right, title and interest which they had or have in and to the premises involved, the real property involved in this controversy; which stipulation is made for the purpose of enabling the Court to enter a decree confirming the entire title in the purchasers, rather than the portion. Do I understand, Mr. Fraser—

MR. FRASER: That is all right. It is for the purpose of confirming the title in the purchaser, only.

MR. MONTGOMERY: Now, in view of this stipulation, and for the purposes of preserving the record, I desire at this time to have the record show, in addition to the grounds already presented at the hearing yesterday, a further objection to the allowance of a commission for the sale of the real property involved in this controversy, and interest on such commission, and also to the allowance of a fee for maintenance of the property during the period of time suggested yesterday, upon the ground that it appears now upon the face of the record that at the time when the sale of the real property in controversy was made the defendants J. L. Niday and Mollie Green Niday, his wife, were owners of a paramount title in and to a half interest of the real property involved in this controversy, in addition to the title claimed under the conveyances which have already been set aside.

Now in connection with that objection, the Court will, of course, appreciate that it is really a reiteration of the objection made yesterday, and I presume Your Honor would not care to have any further discussion of that point, other than I might suggest that up until this stage of the proceedings the plaintiff has not been able and was not able upon the trial of the case to establish these conveyances. We alleged on information and belief in the complaint the existence of such conveyances, and assumed, owing to the attitude of the two brothers, that the conveyances had been made; and that was denied by the answer filed in the case, and we were unable to procure any evidence to establish it, although it seemed not altogether material to the merits of the controversy. But I don't know whether Your Honor would consider that that would have an additional bearing upon the propriety of the allowance of a commission or not. From the standpoint of the plaintiff we feel that it does, and I presume Mr. Fraser will claim that it does not.

MR. FRASER: If the Court please—

THE COURT: I don't think I care to hear any discussion.

MR. MONTGOMERY: There was one other stipulation, was there not, Mr. Fraser, that you desired to make in reference to the claims?

MR. FRASER: Yes, but I will put Mr. Niday on the stand. He has the record from the probate court.

MR. MONTGOMERY: Suppose we prove the record before we take up the accounting.

MR. FRASER: Then I would like to have Mr. Niday testify for a moment.

J. L. NIDAY, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER:

Q. Mr. Niday, in the argument of counsel yesterday he called attention to the fact that in regard to this $2800 claim which you claim to have against the estate of R. E. Green, that it was a matter which should have been presented to the probate court for allowance. I will ask you if you filed a claim against the estate of R. E. Green for that amount or any amount?

MR. MONTGOMERY: I desire the record to show an objection to this line of inquiry. I didn't know that was the subject you were going into.

MR. FRASER: I desire to have the record show this fact.

MR. MONTGOMERY: The objection will be upon the ground that it has no bearing upon the issues in controversy, and should have been presented as such in that form upon the original trial.

THE COURT: Objection sustained.

MR. FRASER:

Q. Then, Mr. Niday, do you know whether or not notice was given to creditors to present their claims against the estate of R. E. Green, deceased?

MR. MONTGOMERY: To that inquiry I make the same objection already interposed, on the ground that it has no bearing upon the issues in this controversy.

MR. FRASER: If the Court please, I think the records will show that for the reason that this property would belong to the creditors, if this was turned back to Mr. Green it does not belong to the heirs, except after the creditors receive their amounts, and I think the record should show, for the protection of Mr. Niday, that the time has expired now for the parties to come in and file claims.

THE COURT: If that is the only purpose, I assume there will be no objection. It would simply go to confirm the absolute title.

MR. FRASER: The title of the purchasers.

MR. MONTGOMERY: Of course, I assume that that would be a matter within the jurisdiction of the probate court, that is, whatever the statutes might permit. If the statutory time had run, the claims could not be filed. I understood that that would be covered in a different form, by stipulation,

which I was willing to consent to, with one modification.

MR. FRASER: I don't see how it could hurt the defendant any and it might be of benefit.

THE COURT: I don't see how it could hurt anybody or help anybody, because if the time has run as a matter of fact your title is good, and if it hasn't run as a matter of fact the title isn't good, and any adjudication we might make here would probably be without the issues.

MR. FRASER: If the Court please, there is another theory upon which it might be material. The Court has disallowed $4000 of attorney's fees in this case, and I maintain that the defendant cannot be placed in statu quo by decree of this Court, if that is eliminated, if he were entitled to it, for the reason that when this action was commenced it was too late for Mr. Niday to file a claim against the estate for any attorney's fees, and I believe we have a right to show that fact.

THE COURT: Gentlemen, I don't intend to retry the issues in this case. You had your day in Court, and you have tried the issues, and I don't care to open it up again. Going into some of these questions might affect other considerations.

MR. FRASER: That is all. We take an exception to the ruling of the Court.

(Witness excused.)

MR. MONTGOMERY: Now, yesterday afternoon, after the adjournment, Mr. Niday presented to us, and we re-checked with him, a certain itemized statement of moneys which Mr. Niday claims to have expended on behalf of this real property, together with certain debits which he claims should be allowed. The issue arose in connection with this adjustment as to certain items which might go to constitute the sum of $900, as suggested yesterday morning, as payment in connection with the first deed, and we agreed,—I think the ruling was, yesterday, as I understood it, that $900 should be determined, the amount of that money advanced should be determined as of the present date instead of the date of the deed, although I do not know that that question was suggested. It might have been an oversight upon my part. It occurred to me upon reconsideration that the valuation would properly be determinable as of the date the conveyance was given, but Your Honor suggested $900 yesterday, which was on the basis I think of the present sale valuation. I am not myself exactly clear as to whether Your Honor determined finally the time when that amount should be determined, and I don't know that I presented it. You contend, Mr. Fraser, that it should be determined as of the present date, or the date of the delivery of the deed?

MR. FRASER: We contend, if the Court please, that he made these advances for Mr. Green for this conveyance, and we are entitled to the proportionate value of that six acres as of the balance of the ranch at the time it was sold.

THE COURT: That is really what I had in mind, that it was simply doing equity. However, I gave that particular phase of it no consideration.

MR. MONTGOMERY: I think, as I stop to recall the matter, that possibly I didn't call that to the Court's attention yesterday, and, as I say, on second consideration last evening—

THE COURT: Is it material at the present time to determine that?

MR. MONTGOMERY: It is material only in the sense of determining the amount, is all, if the proportionate value at that time would differ to the extent of two or three hundred dollars.

THE COURT: Would it make any difference as to the result? Would the value of the land be absorbed anyway by the advances? If under one theory they wouldn't be absorbed by any such advances as Mr. Niday made, then of course the question would become material, but if the full value of the land would be absorbed by the advances, I see no reason why it should be taken up.

MR. MONTGOMERY: The only question was, the total of the claims came up, together with eight per cent interest, they aggregated a considerable sum,

leaving a total of something like $3,000 Your Honor suggested should be provided for in the decree, and it would be simply a matter of reduction of that amount. We have added up the total claims presented, together with the total credits, and the totals, on the theory which we contend, would make a difference of something like $3000 in favor of Mr. Niday, so there is no total absorbtion of the—

THE COURT: I don't think I follow you. As I understand, this matter of the six acres was a distinct item by itself. After the value of the six acres upon either theory is fully absorbed by the advances made, I don't see how the question is material.

MR. MONTGOMERY: I see Your Honor's point. I do not make myself clear. Mr. Niday has included in the statement of disbursements this item of the $900, that is, he is charging us $900, instead of making it a separate item, he simply adds it into the main account, and therefore, it arises purely as a mathematical proposition in connection with the total computation.

THE COURT: Well, I wouldn't approve of that method of accounting. If the advances absorbed the value of that land upon either theory the thing to do is to deduct the price received for this six acres of land from the total charge against Mr. Niday.

MR. MONTGOMERY: On that theory that would—

THE COURT: I assumed that was understood yesterday, gentlemen. I don't know that it makes any difference in the result. In other words, if Mr. Niday got this land upon the consideration that he was to make some indefinite advances, as I said yesterday, the transaction was voidable, but would not be avoided except upon the condition that equity be done, in other words, a reimbursement to Mr. Niday of the moneys he advanced on account of this understanding,—then the plaintiff may take one of two courses; she may either return to Mr. Niday the money he has advanced and take title to the land, or she may say, "the equities in favor of Mr. Niday are so great that there is nothing left, and I don't care to attack the title," and he may continue to hold the title.

MR. MONTGOMERY: As between those two theories I would prefer to have the plaintiff to elect to allow the amount of this to be entered in the total claims presented, because the present mortgage or security outstanding upon the real property, as I understand, embraces the entire 212 acres; that is, when we come to enter our final decree, having agreed to take the securities, the security simply is put up on the theory that the interest and principal will be distributed according to the rights of the parties, and there will be no way of

segregating it to pieces of real property. In order to present that I think the better form would be simply to include it as a claim. As I said yesterday, the difficulty arises in the attempted segregation, insofar as everyone is concerned. I was sincere in my statement. The whole thing has been dealt with as an entity, and insofar as the present security is concerned there would be no way of segregating the six acres.

THE COURT: You must do it either theoretically or actually.

MR. MONTGOMERY: Theoretically we would be doing it in allowing the claim, and Your Honor will see how the question would arise in determining that amount of money, as to what date it should be determined. I think our testimony was that the value at that time was $20,000, and Mr. Niday's, $15,000.

THE COURT: Well, gentlemen, I really don't see the difficulty, unless there is some question as to the amount advanced. If you concede, as I understand to be the case, that the land presently or at the time it was sold by Mr. Niday, the six acres, was worth $900, in other words, that in the total sale he really was to get $900 for this land, then he is to be credited with that amount, provided his advances, together with interest thereon, would amount to $900. That would be the only way in which I could do equity to him. In other words,

I am simply saying to you, you must return him the money advanced on this land, together with interest.

MR. MONTGOMERY: I can see Your Honor's suggestion is right. Of course, the only point is that we do not feel, as I suggested yesterday, that under the testimony as presented, the evidence really showed a valid contract to that effect. But that matter was determined adversely to our contention, and I accept the determination. And on the last suggestion I would simply like the record to show that we do not admit or feel like admitting that there was an agreement to advance him or that he actually advanced him that amount of money, with that understanding.

THE COURT: Yes, I understood your position on that, and in that connection I stated to you yesterday that I am not satisfied with the general statement of Mr. Niday upon that point, which was read to me in the record yesterday, about his advancing $2800, and that you were at liberty to open that question and inquire further of Mr. Niday and examine his books, etc., for the purpose of either satisfying yourself or presenting the matter to me, as to whether he advanced anything on that account, and, if so, how much.

MR. MONTGOMERY: Of course the practical difficulty there is that we have his statement that certain moneys were advanced, and as to this item we took his statement yesterday as to items aggre-

gating the $900, so on Your Honor's present suggestion of your theory of the allowance of that $900, the question of the time of determining its value would be automatically eliminated. As to that question we have agreed upon two items, one for rent of the house in which Mr. Green lived, at the sum of $20 for 29 months, and another item of taxes, which, taking the two together, without going into any detailed statement such as Mr. Niday has heretofore presented, made up, according to his theory, an advance of $900. That is, he is paid so much a month for the rental of the house in which Mr. Green lived. In that connection another difference arises between us as to what we should be allowed with reference to rental that Mr. Niday received and which went into his possssion in the year 1915. In the original statement submitted to us prior to the institution of this litigation there was attached in the form of certain credits moneys which Mr. Niday had received in the year 1915, on rent for this 212 acres, plus some other incidentals during that period of time, together with certain moneys which he had received from the estate of Taylor and Satterfield. When we came to that question yesterday both Mr. Niday and Mr. Fraser took the position that that had nothing to do with the present controversy, and that that should be considered as having been absorbed in any advances that Mr. Niday may have made. We take the posi-

tion that although that was in the year 1915, according to this—I was going to say according to this, all of these moneys came in prior to the time when the second deed was given, but it seems not; there seems to be some items here following the giving of the deed of Octobr 1st. During the year 1915 this property was rented to a man by the name of Leash. Apparently the dealing was directly with Mr. Niday, regardless of what the record title showed at that time, and he paid Mr. Niday certain rents during that period of time. I can see no theory upon which Mr. Niday should now claim that he does not owe to the heirs the moneys received at that time; and in corroboration of my position, there is contained in his statement of claims an item of $100, which he says he advanced in the year 1915 to this Mr. Leash. When the item was presented to us yesterday we had a receipt signed by Mr. Leash. I had no way of checking whether it was a cash transaction, but I met Mr. Leash last evening in Nampa, and he explained, which I presume Mr. Niday will agree to, that that was a credit on his rent, that there was no cash transaction between them, and that this item of $100 which Mr. Niday is charging as cash was simply a credit to Mr. Lesch upon the rent he owed, in lieu of some personal property in the form of a fence which he left upon the property. We don't dispute that item of $100 if he did advance it and

the property was benefited by it; he would be entitled to collect it. Upon the same theory, that being interwoven with the rents received, it seems to me that these rents are properly chargeable as a credit at this time in favor of those entitled to the real property.

THE COURT: I don't believe I understand the controversy between you there. Is this for the period prior to the execution of the second deed?

MR. MONTGOMERY: Yes, this is for the period of 1915. This was rent received upon the real property which went into the hands of Mr. Niday.

THE COURT: It hadn't been my thought that this account would go back of the date of the deed.

MR. MONTGOMERY: Yes, this is for the period of 1915. This was rent received upon the real property which went into the hands of Mr. Niday.

THE COURT: It hadn't been my thought that this account would go back of the date of the deed.

MR. MONTGOMERY: My position would have been throughout the case that the account would not antedate the deed, that we weren't having a general accounting, other than the question came up yesterday in connection with this subject of personal advances in relation to this other deed.

THE COURT: We didn't go back of the other deed for an accounting, so far as that deed is concerned.

MR. MONTGOMERY: Not exactly back of it, but it put a little different aspect on our position with reference to that deed.

THE COURT: I can't see, gentlemen, how I can go back of the deed transactions. Now it is true that in the original opinion I considered the two together. I had overlooked this statement about the advance of the $2800, and apparently it was a very brief and general statement; but if you are going into a general accounting, in other words, if you are going back of the deed in each transaction so far as that transaction is concerned, and going into the general relations between Mr. Niday and Mr. Green, then of course we shall have to examine both sides of the account and would have to strike a general balance. That would open up the whole question of what is due Mr. Niday from Mr. Green, and I expressly limited his claim against this six acres, or expressly limited his advances to the matter of the six acres. Now if you are going back of this second deed for an accounting, evidently you will have to open the door for both sides.

MR. MONTGOMERY: I see the Court's point. I merely suggest in that particular that there would exist in my mind a distinction between an accounting relating to personal advances and an account which might deal directly with the question of the maintenance of the real property, that is, if moneys were received at that time which should have been

used in the maintenance of the real property, rather than to indulge in the transactions which took place in this case, it would have been unnecessary, for instance, to give the first deed, if the income being received here was sufficient to maintain that property.

THE COURT: But an advance by Mr. Niday or a receipt by Mr. Niday relating to the land prior to the deed would have no more relation to the cause of action involved in this suit than something relating to property in another state or other personal affairs of Mr. Green. Up to the time of the execution of this deed there wasn't any cause of action at all.

MR. MONTGOMERY: That is correct.

THE COURT: While it may have related to the land, it didn't relate to the cause of action in controversy, and it was no more distinct—it wasn't a distinct thing at that time. Mr. Niday may have advanced Mr. Green money to take care of the land, he might have advanced him money to take care of his home in Nampa, or to buy clothing or food or anything else. It would all be upon the same footing. It would be simply a general account, for which he could assert a claim. On the other hand, if Mr. Green paid him it wouldn't make any difference from what source the money came, until the deed was executed. Then in trying to do equity we cast up the account on both sides. If that is the point, I think I shall have to decline to—

MR. MONTGOMERY: I take it, of necessity, then, any claim which Mr. Niday may have here which is interwoven with these same rents would necessarily be denied.

THE COURT: Unless it has to do with caring for the land and the maintenance of it.

MR. MONTGOMERY: I mean this arose out of the rent, that is, this $100 was an amount of money received by Mr. Niday and deducted from the rents.

MR. NIDAY: If the Court please, we dispute that as being a fact at all. As a matter of fact that $100 rose out of the lease rent merely in this way—

THE COURT: Before you proceed—this is after you took the deed?

MR. NIDAY: Yes, after I took the last deed.

THE COURT: Mr. Lesch was a lessee under you?

MR. NIDAY: No; he was a lessee under Mr. Green, but before the termination of his lease the property was conveyed to me; then subsequent to that time Mr. Lesch came to me and he says, "I have three hundred and some odd feet of woven wire that was put in there on this farm under my lease from Mr. Green," and he says, "I would like to sell it to you rather than take it away," and he knew that I would purchase it, and so I bought it from Mr. Lesch and showed them the receipt.

MR. MONTGOMERY: Did you pay cash for it?

MR. NIDAY: I paid cash for it, yes.

MR. MONTGOMERY: You dispute Mr. Lesch on that?

MR. NIDAY: I dispute Mr. Lesch on that.

MR. FRASER: I can't see how it is material. the $2800 account of Mr. Niday shows far more than enough to take care of the $900.

THE COURT: This is another matter. This refers to the second deed, the larger deed.

MR. NIDAY: Yes, Your Honor.

MR. MONTGOMERY: How was that paid?

MR. NIDAY: I think I can find the check. Of course that was some time ago.

MR. MONTGOMERY: Of course if you have a check that you paid him, actual cash—we have no way of checking it back, except from the original sources, and he states that it was taken from the rent. That eliminates that question, if you have the check. Now, there is another item here.

THE COURT: It is probable that if Mr. Niday keeps his checks and stubs he can verify his recollection.

MR. MONTGOMERY: December 4, 1915, at the time when I assume he was continuing under the lease from Mr. Green, December 4, 1915.

THE COURT: What is the item?

MR. MONTGOMERY: $100 for buying his fence.

THE COURT: That is the matter we have been discussing.

MR. MONTGOMERY: Yes; I say the lessee claims it was deducted out of the rent, and Mr. Niday says he paid cash.

THE COURT: Then it is just a question of what is the fact.

MR. MONTGOMERY: Yes. There was no voucher produced yesterday. So I assume if it was deducted out of the rent we would be entitled to have it eliminated.

THE COURT: Yes.

MR. MONTGOMERY: There is a claim of $291.02, June 19, 1915, for water tax assessed, now being charged against this 212 acres. I understand, Mr. Niday, from the occupant of the premises, that that water was used on more than the 212 acres. Is that correct?

MR. NIDAY: No, this water wasn't. I showed you in those tax receipts that it was segregated.

MR. MONTGOMERY: But Mr. Lesch told me he paid this water rent and the same was taken out of your rent, and it was used not entirely on the 212 acres, but on the 312, one hundred in addition to the 212.

MR. NIDAY: That isn't so. I showed you the receipts yesterday.

MR. MONTGOMERY: You showed me the receipts, but the receipts just speak in general terms.

MR. NIDAY: The receipts describe the property it is assessed against.

MR. MONTGOMERY: On that question I will have to ask to take evidence, because the occupant of the premises says that the water was not confined to this 212 acres, although paid in the name of Greenhurst. The entire property was assessed to Greenhurst.

MR. NIDAY: I am surprised, Mr. Montgomery, because we compared the description there. It is a particular part of this property that this was applied to. I think what is confusing Mr. Montgomery is that Mr. Lesch did have a tract of land just across the road, that went to Mr. Moore, under a lease from Mr. Moore.

MR. MONTGOMERY: Mr. Green hadn't sold it at that time, had he?

MR. NIDAY: Yes; and of course that was paid also, but it is a separate description and a separate assessment, and Mr. Montgomery's attention was called particularly to the description, and he had his abstract to compare it with, so it applied only to what we have been calling Greenhurst proper.

MR. MONTGOMERY: That again is a question of fact.

MR. NIDAY: That can readily be determined from the receipts which I have.

MR. MONTGOMERY: The receipts might not show the distribution of the water.

MR. FRASER: He might take water belonging to Greenhurst and use it on some other land. That wouldn't affect it.

THE COURT: It ought to be very easy to reach a positive conclusion.

MR. MONTGOMERYY: Yes; I will veryfy that. I assumed there would be no dispute. I took the lessee's statement; I had no other means of verifying it. I think that concludes all the differences.

Now do you want any further stipulation with reference to those claims that you suggested yesterday? I agreed to make a stipulation, yesterday.

MR. NIDAY: Well, you objected to it.

MR. MONTGOMERY: I objected to your method of inquiry.

MR. NIDAY: I don't care anything about it now.

MR. MONTGOMERY: I will agree that those claims not be filed, although I would like to suggest in that particular, on learning from Mrs. Niday yesterday that out of the $500, including this, letter, which we investigated, it was not carried in Mr. Green's name, but in her name, to conceal it, as she stated, from creditors. On behalf of the plaintiff, if you will produce any of those creditors from whom that $500 was concealed at that time, we

would like, in the name of the plaintiff, to make them compensation, if they were unsecured creditors at that time.

MR. NIDAY: They have all been paid. It was only a question of getting time to pay them, was all.

MR.MONTGOMERY: I think that covers all the items that were in dispute. That leaves only two questions of fact to be determined, the question of the $100 and the distribution of the—

MR. FRASER: Can we have that at two o'clock this afternoon or later?

MR. MONTGOMERY: Have you got any other record, showing the distribution of the water, what became of it?

MR. NIDAY: The assessment shows for itself. We can't change it. It is a matter of public record. This land is assessed for certain water; there is a certain amount of assessment against that land every year, and it has got to be paid.

THE COURT: It could be verified from the books of the company. Where are those kept?

MR. MONTGOMERY: Kept in Nampa.

MR. FRASER: We can produce the receipt signed by the proper official of the company.

MR. MONTGOMERY: This water tax assessment appears to be for June, 1915, prior to the time you got the deed of October. Was that paid out in cash by you or deducted from Mr. Lesch's rent?

MR. NIDAY: It is my recollection that it was paid out in cash by me.

MR. MONTGOMERY: He claims to me that he paid it at the water office, under your direction, and then it was deducted from his rent.

MR. NIDAY: I think where this confusion arises, if the Court please, as I remember it at that time the Nampa & Meridian Irrigation District had what they call a toll charge that was paid before they turned on the water; then they had the regular assessment charge, that was paid twice a year, and that Mr. Lesch paid the toll charge; I think that was it.

MR. MONTGOMERY: Well, if he paid this water charge himself and then it was deducted from the rent, you have no objection to excluding it—

MR. FRASER: The toll charge is not that charge.

MR. MONTGOMERY: I am talking about that item.

MR. NIDAY: Mr. Lesch doubtless misunderstands. There was a toll charge at that time, that the district wouldn't turn on the water until the toll charge was paid. Then, in addition, they levied a regular assessment, and that was in the form of a tax.

MR. MONTGOMERY: My question is, if Mr. Lesch deducted this from the rent he owed Mr. Green, you will agree to eliminate it?

MR. NIDAY: Oh, certainly; that is to say, if that has been charged in this account as a setoff, of course it should be deducted.

MR. MONTGOMERY: It is at the top of this sheet here.

MR. NIDAY: It might be in the question of the rents on this general statement, because that shows the credits that Mr. Green got on any rents that came into my hands, and it shows a credit there of $300,—let's see,—there is three hundred and three hundred, is six hundred, one hundred is seven hundren, and a hundred and sixty-two is eight hundred and sixty,two, and fifty, is practically nine hundred dollars, and the two hundred that I showed you the statement for, where the rent was deducted makes the eleven hundred or eleven ten. So you see he is getting full credit for the rent for that year. That was the amount of the rent for that year, and that is given as a credit.

MR. MONTGOMERY: Those items you claim have been eliminated from the case, those items you have just read are the ones the Court passed upon this morning.

MR. NIDAY: I don't understand, if the Court please, that they have been eliminated. I understand that I was merely to have a credit there of $900. As a matter of fact this was kept as an account, moneys advanced and moneys received. The moneys received, of course, were Mr. Green's

moneys; they were delivered to him when he wanted them; and the moneys advanced, other than that, —the difference, rather, between the moneys received and the moneys advanced was the balance due me, which amounted to something like $1450. That is the way the account was kept regularly.

MR. MOTGOMERY: I don't follow counsel's position there myself. He is putting in $200 as a —claiming that he paid that out; he is charging us $201.09, together with eight per cent interest, for moneys advanced by him on June 19, 1915, in the payment of water assessment. Now—

THE COURT: What is the date of the second deed?

MR. MONTGOMERY: The second deed is October 1, 1915, just six months before the—

THE COURT: Why do you make such a charge as that, Mr. Fraser, against this $30,000, the $30,000 received for the land? Eliminating the $900 for the six acres, then there would be $29,100 chargeable against Mr. Niday. Now you credit him with what he has paid out on account of the land since he got his deed, but how do you go back before the deed and take credit for this $200?

MR. FRASER: Mr. Niday can explain that, if the Court please.

THE COURT: Very well. You understand I am not asking you about the six acres, because we are eliminating that. But I don't see how un-

der the rule that you contend for here, and that I have recognized, how you can go back of the deed and claim any credit. I am not charging you with anything back of the deed.

MR. NIDAY: I am inclined to think, if the Court please—

MR. FRASER: What item have you reference to?

MR. MONTGOMERY: There are the first five items there—September the fourth—the first four are all items paid prior to the execution of the deed.

MR. NIDAY: The one of December 31st—

MR. MONTGOMERY: That is eliminated. That was the taxes for 1915, paid on December 31st, but it accrued before you purchased.

MR. NIDAY: Well, I don't know; I would have to look that up.

THE COURT: He would be entitled to a credit for that item.

MR. NIDAY: I wouldn't be entitled to it, Your Honor, unless it were paid. Those taxes were paid in two payments and the 1915 tax would not be paid until June, 1916.

THE COURT: Half of them would become payable in the latter half of December.

MR. NIDAY: Well, if the Court please—

MR. MONTGOMERY: Yes, half of it would be payable in December of that year, and the other

half in June or July following. Your own statement shows that it was paid in June, 1915.

MR. NIDAY: That is the question, whether it was the year it belonged to or the year it accrued. I will have to determine that. You had it before you yesterday and you didn't raise the question.

MR. MONTGOMERY: I didn't have a chance to check these over.

THE COURT: What is the date of this item for taxes?

MR. MONTGOMERY: June 19, 1915, and the interest on that was figured from that date.

THE COURT: It is highly probable that that is a payment for the second half of the taxes for 1914.

MR. NIDAY: It is possible it might have been a payment I made for Mr. Green.

THE COURT: And of course if that is the case that would have to be eliminated.

MR. FRASER: If it is eliminated, of course we take an exception. Our position is that if Mr. Green were here he would not only have to pay the amounts the Court now holds, but all the moneys he has advanced.

THE COURT: I am willing to allow you everything that you have paid out on account of the land in preserving it and caring for it and handling it since you took the deed, but I will not allow you

credits for any general claims which you might have against Mr. Green.

MR. MONTGOMERY: There is another item, July 2, 1915, for the 1914 assessment.

MR. NIDAY: That would be in the same category.

MR. MONTGOMERY: With those two eliminations. What was that one-half water storage paid September 8, 1915? Was that for 1914? And you figure interest from that date.

MR. NIDAY: Well, I don't know only what it shows here.

MR. MONTGOMERY: This is your own statement, made up.

MR. NIDAY: You have got it before you.

MR. MONTGOMERY: Then let us agree to eliminate it.

MR. NIDAY: All I would say is that I would have to look it up before I would know.

MR. MONTGOMERY: That settles all the claims, if the Court please, unless you want to look that up first.

MR. FRASER: In the case of taxes, if the Court please, it rather occurs to me that we would be subrogated to the rights of the county in the matter of those taxes, under the general presumption of equity that they are a little different from a claim against Mr. Green or his estate.

THE COURT: That would depend upon when they were paid, the taxes for what year. In order that there may be no misunderstanding, gentlemen, I have already stated that I am willing to allow you reimbursement or credit for any thing you paid out on account of the land after you took the deed. I am excluding items of any general nature that Mr. Niday may have had with Mr. Green, because no such issue was presented in the pleadings. And there is no evidence to the effect that there was any understanding that the land was conveyed to Mr. Niday in consideration of any money Mr. Green may have owed him, but upon the other hand Mr. Niday's statement is to the effect that there was no such understanding. As to this particular item, if Mr. Niday merely in his general dealing with Mr. Green, of advancing money to him from time to time as needed, and receiving money belonging to Mr. Green, and crediting him with it, in other words, keeping a general account with him, if, in June, 1915, three or four months before the deed was executed, before there was any understanding that the deed should be executed, simply paid these taxes as one of the items of this business relationship, and charged it up to Mr. Green in a general account, I can't see that it has any higher standing in equity than any other advance he may have made. If upon the other hand a tax lien attached to the land for the taxes in 1915, that is, attached

as of January, 1915, and conveyance wasn't made until October, and after the conveyance was made Mr. Niday discharged that lien by paying the taxes for 1915, then he is entitled to credit for such payment.

MR. MONTGOMERY: Now, Mr. Niday, each one of these items was checked, as you suggested, yesterday, with your receipts, and I checked the interest dates with you and agreed with you insofar as the dates are concerned, so you had looked it up. You had your receipts there when you presented this statement.

MR. NIDAY: The only thing that makes me think there is something wrong with that is that there is nothing to show here that the last half of the taxes for 1915 or the water assessments for 1915 were paid in 1916, which I am confident was done, and I will state—

THE COURT: You say the taxes—the general taxes?

MR. NIDAY: Both the general taxes and the water assessments.

THE COURT: It is almost impossible to see why you should have entered a date there of June unless it be for the last half of taxes for 1914, because no taxes for 1915 would become due at that date.

MR. NIDAY: That is why I am inclined to think it was an error. I am inclined to think it was

paid in 1916, and for some reason I put it under that year by mistake, because this is all arranged by years. There is nothing here to show that the last half of the 1915 has been paid at all, and I am very confident about it.

THE COURT: Well, it will only take you a few minutes—

MR. NIDAY: Yes, we can look that up, and I presume it will be no trouble to determine that from our receipts.

MR. FRASER: We will look them up and see.

THE COURT: Is there anything else, gentlemen?

MR. MONTGOMERY: Nothing else. I think that covers all questions in dispute. I will dictate a decree. It is simply a matter now of determining the difference between these two amounts.

Just one thing further. As I understand you now, Mr. Niday, after eliminating these disputed questions of credit, you intend to make a total, or Mr. Fraser will, of the claims in this statement, and hand it to us, total the credits which you have presented, to which we agreed yesterday, and subtract the two and charge one-half to us. I don't want a dispute as to the method of computation.

MR. FRASER: I guess we can arrive at it by computing it all right.

MR. MONTGOMERY: If we can't, I would rather have the Court determine that. We seem to

be unable to agree when we get together as to what has been done or said, and I don't like to come back with another question. In order that the Court may understand my position: We have a statement here of claims submitted, and against that is a statement of credits. As I understand it, take the total of the claims presented and the credits presented, and take the difference, and divide that by two?

THE COURT: The plaintiff now represents one-half.

MR. MONTGOMERY: One-half of the property.

THE COURT: Mr. Niday holds the other half.

MR. MONTGOMERY: Yes.

THE COURT: I can't see how there would be any question about it.

MR. MONTGOMERY. I don't, myself, but the only reason I suggest it, we seem to have a little difficulty about minor propositions, and I don't like to come back.

MR. FRASER: There is another matter in the case. I don't know very much about it, and yet it may be very material, where they make this settlement that they pay one-half. There is the interest of Mrs. Niday in this estate that is yet unaccounted for so far as we know. In other words, Mrs. Niday is not contributing to Mr. Niday her share of the moneys which she advanced on Green-

hurst and taxes and everything else on this matter. Mrs. Niday is an heir and Mr. Niday is not. In other words, in this decree Mrs. Niday is entitled to a proportionate interest in this estate.

THE COURT: Is she a party to the suit?

MR. MONTGOMERY: Yes.

MR. FRASER: I don't care to take the time of the Court in that now. I am just suggesting it.

MR. MONTGOMERY: If you have a suggestion of that kind, I would suggest that you present it and determine it. I have really got to get back to Portland tomorrow morning, and I would like to get some definite understanding and not keep returning to the Court. Is that a claim you want to present?

MR. FRASER: I say nothing about it. I simply make the statement that we don't consider we are in statu quo in this procedure.

THE COURT: Mr. Fraser, the Court will very readily put you in statu quo, if you want to be put in. You appear for Mrs. Niday as well as Mr. Niday?

MR. FRASER: I will say to the Court that in thinking the matter over the question struck me as to how this interest of Mrs. Niday's could be taken care of.

THE COURT: Mr. Niday has that interest, hasn't he?

MR. FRASER: No, he has not her interest.

THE COURT: She is not asking that the decree be set aside as to her?

MR. FRASER: No, she is not asking anything. I just say the matter occurred to me, and I had no solution for it myself. I will be frank to say I don't know just exactly what should be done.

THE COURT: I would say that the decree might be made in such way as to cut off her interest. She is made a party to the suit.

MR. FRASER: I will say I don't think it is very material in the matter, but it is just a matter that occurred to me in regard to it.

MR. MONTGOMERY: If the Court please, I will make the suggestion,—Mrs. Niday joined in the deed with Mr. Niday to these purchasers, conveying, as I understand, all her interest. The decree of this Court sets aside the two conveyances, or will set aside, when drawn, the two conveyances from Mr. Green to Mr. Niday, but Mr. Niday and Mr. Fraser, representing not only Mr. and Mrs. Niday, but these purchasers, have come in here on behalf of the purchasers, and asserted a claim of innocent purchaser for value, that is, they took from Mrs. Niday and Mr. Niday their interest in the property, not knowing at the time they took it that there were outstanding claims. That was really an issue in the case, and was eliminated by stipulation of the parties. From the standpoint of

the record the decree will confirm in these purchasers the interest of the plaintiff, and likewise, under the stipulation this morning, the interests of the two brothers, and at the same time there has been introduced in evidence the deed showing the conveyance of Mrs. Niday's interest to these purchasers, and these same people are here representing and protecting those very purchasers; in fact Mr. Niday has given them a warranty deed, telling them it is a perfect title. While the chain of conveyance has been broken, the title is vested in them, and it seems to me that under the decre and the record as it now stands they have procured the interests of all. I am at a loss to understand what counsel suggests.

THE COURT: There is no question about that. Mr. Fraser raises a question between Mr. and Mrs. Niday, and Mr. Niday is geting the worst of it. Now if it is wholly unnecessary and if Mr. Niday doesn't want the worst of it from his wife, he may have a decree confirming in him what would otherwise be the interest of Mrs. Niday. In other words, it would simply give him all that he supposed he had.

MR. MONTGOMERY: No, there is no question about that.

MR. FRASER: I didn't raise the question at this time for the purpose of taking any advantage of it at this late time.

THE COURT: You represent both of these parties here, Mr. Fraser.

MR. FRASER: That would be perfectly satisfactory, to have the decree confirm the title in Mr. Niday so far as her interest is concerned.

MR. MONTGOMERY: That will be perfectly satisfactory to us.

THE COURT: Very well.

MR. NIDAY: I don't see how that is material

THE COURT: She is stopped from questioning his title. It is just a matter as to who owns these securities now, that is, the other half interest. The plaintiff gets a half interest, and you will have the whole of the other half interest unless you want to—I suppose the plaintiff is entirely neutral on that subject. As between Mr. and Mrs. Niday the decree may go any way you desire.

MR. FRASER: I suggest that you confirm her right, title and interest.

The above and foregoing statement is hereby settled and allowed as the statement on cross appeal of the plaintiff, Julia Green Graef, in the above entitled action.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 11, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER DIRECTING DELIVERY OF TENDER.

To W. D. McREYNOLDS, Clerk of the above entitled Court:—

You are hereby authorized to deliver to J. L. Niday, the above named defendant, or to any depositary named by the above entitled Court, those certain checks, one in the sum of $4,313.47, and the other in the sum of $49.66, which were delivered to you by the plaintiff on the 14th day of February, 1921.

Said amounts being a tender made to the defendant, J. L. Niday, in accordance with the interlocutory decree in the above entitled Court, heretofore entered in the above entitled cause, and you are fully authorized to make whatsoever disposition of said sums of money as shall be required by the final decree in the above entitled Court, in the above entitled case, but such payment to the said J. L. Niday is made under protest and subject to the following objections:

That said sum of $4,313.47, and said sum of $49.66, so tendered to the said J. L. Niday, in accordance with the interlocutory decree of the above entitled Court, include profits made by the defendant J. L. Niday, out of the handling of the real property involved in the above entitled cause, the title to which real property was procured by the said J. L. Niday through undue influence, and upon the

further ground that said J. L. Niday took the title to said real property in trust and has since the date of so doing procured the title to said real property by purchasing in his own right from some of the heirs of R. E. Green, deceased, certain interests in said real property, and has not been compelled to account to the plaintiff above named, or any of the heirs of R. E. Green, deceased, for the profits, if any made out of said purchases, and upon the further ground that said plaintiff is being required to make said tender and payment before the entry of any final decree in the above entitled cause, and without any right to appeal from the order of said Court requiring such payment and tender.

PLATT & PLATT,
MONTGOMERY & FALES,
Attorneys for Plaintiff.
Boise, Feby. 26th, 1921.

Received of W. D. McReynolds, Clerk, the check and draft mentioned in the above authorization.

J. L. NIDAY,
By ALFRED A. FRASER,
His Attorney.

Endorsed: Filed Feb. 19, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)
Form of decree proposed by cross appellant.

This cause came on to be heard at the September term, 1920, and was further heard at the Feb-

ruary term, 1921, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows: viz:

(1) That that certain deed bearing date the 22nd day of December, 1914, recorded on the 19th day of February, 1916, in Book 75, page 13, of the Deed Records of the County of Canyon, State of Idaho, from R. E. Green, a widower, to J. L. Niday, conveying the following described real property, to-wit:

> That part of the northeast quarter of the northwest quarter of Section 6, in Township 2 North, Range 1 west of Boise Base and Meridian, lying north and east of the right-of-way of the Oregon Short Line Railway Company, containing six acres of land, more or less, situated in Canyon County, State of Idaho; together with the ditches and ditch rights, and a water right consisting of four miners inches of the waters of what is commonly called the Ridenbaugh canal, owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof,

be, and the same is, hereby set aside and held for naught.

(2) And that said deed bearing date, the 1st day of October, 1915, from R. E. Green, a widower, to J. L. Niday, recorded on the 27th day of May, 1916, in Book 74, page 253, of the Deed Records of Canyon County, State of Idaho, conveying the following described real property, to-wit:—

> The southeast quarter of the northwest quarter and lots numbered 2 and 3, and all that part of lot numbered 4 lying north and east

> of the right-of-way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa & Meridian Irrigation District, all in Section 31, Township 3 north, Range 1 west, Boise Base and Meridian, containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in any wise appertaining.

be, and the same is, hereby set aside and held for naught.

(3) That all of the right, title and interest of the plaintiff above named, and of her assignors, Philo F. Green and Gratia K. Acuff, in and to the above described real property, and all of the right, title and interest of George L. Green and John M. Green, assignors of the defendant J. L. Niday, and all of the right, title and interest of the defendant J. L. Niday and Mollie Green Niday, his wife, in and to the above described real property, be, and the same is, hereby forever quieted and confirmed in the defendants George A. Buell and Effie Ada Buell, his wife, and A. L. Green.

(4) That the sum of $4,313.47, together with interest thereon from December 23, 1920, to February 14, 1921, has this day been tendered and paid to the defendant J. L. Niday, in accordance with the interlocutory decree of this Court and in accordance with the stipulation of the parties.

(5) That the defendant J. L. Niday is hereby declared to be a trustee of the proceeds arising

from the sale of the above described real property, and is hereby ordered to account to the plaintiff for all profits made by him out of the handling of said real property since the 22nd day of December, 1914, including any profits made by the said J. L. Niday in purchasing the interests of George L. Green and John M. Green, the sons of R. E. Green, deceased, and reselling the said interests to George A. Buell, and Effie Ada Buell, his wife, and A. L. Green, and pay to the plaintiff one-half of said profits.

(6) That the defendants J. L. Niday and Mollie Green Niday, his wife, shall, within five days from the date of this decree, execute and deliver to the plaintiff an assignment of an undivided one-half interest in and to that certain mortgage bearing date, the 14th day of December, 1918, and recorded in Book 70, page 297, of the Mortgage Records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the above described real property, and endorse the note secured thereby, and deliver said mortgage, together with said assignment of mortgage and said note so endorsed, to the Boise City National Bank, of Boise, Idaho.

(7) That the defendant, J. L. Niday shall, within five days from the date of this decree, deposit with the Boise City National Bank, all interest collected by him on the said note and mortgage since the 1st day of December, 1920.

(8) That the said Boise City National Bank, of Boise, Idaho, shall collect the interest and principal of said note and mortgage at all times when due, and pay the same or any portion thereof when so collected, together with all interest collected by said J. L. Niday on said note and mortgage since December 1, 1920, in the following manner: One-half of such principal and interest to the plaintiff Julia Green Graef, and one-half thereof to the defendant, J. L. Niday. And upon the failure of the said J. L. Niday to so execute said assignment of an undivided one-half interest in and to said mortgage and endorse said note secured thereby and deposit said note and mortgage in the said depositary, the Boise City National Bank, of Boise, Idaho, then this decree shall stand as and for an assignment to the plaintiff of an undivided one-half interest in and to said note and mortgage.

(9) That plaintiff have and recover of and from defendant, J. L. Niday, her costs and disbursements herein, taxed and allowed at $.....

Dated this.....day of February, 1921.

.....

Judge.

Endorsed: Filed Feby. 21, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

By Cross-Appellant.

The above named plaintiff, conceiving herself aggrieved by the final order and decree of accounting made and entered in the above entitled cause on the 26th day of February, 1921, does hereby appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and she prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon her filing a bond for the payment of all damages and costs if she fails to prosecute the said appeal to effect, which bond shall act as a supersedeas bond.

JULIA GREEN GRAEF,
By PLATT & PLATT,
MONTGOMERY & FALES,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon,)

I, Hugh Montgomery, one of the solicitors for the appellant, hereby certify that I have prepared a copy of the Petition for Appeal in the within case, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the defendants and appellees, at his place of business in Boise, Idaho, with postage thereon prepaid, and deposited the same in the United States mail.

HIGH MONTGOMERY,
Solicitor for Appellant.

July 15, 1921.

Endorsed: Filed July 18, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.
To Cross-Appellant.

This day came Julia Green Graef, plaintiff, appearing by Messrs. Platt & Platt, Montgomery & Fales, her solicitors of record, and presented her petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows an appeal for the Ninth Judicial Circuit upon the filing of a bond in the sum of One Thousand ($1,000.00) Dollars with good and sufficient surety to be approved by the Court; and

It is further ordered that said bond shall act as a supersedeas bond, and it is further ordered that a certified transcript of the record and all proceedings herein relating to the final order of accounting be forthwith transmitted to the said United States Circuit Court of Appeals.

FRANK S. DIETRICH,
Judge.

July 19, 1921.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon,)

I, Hugh Montgomery, one of the solicitors for the appellant, hereby certify that I have prepared a copy of the Order Allowing Appeal in the within case, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the defendants and appellees, at his place of business in Boise, Idaho, with postage thereon prepaid, and deposited the same in the United States mail.

HUGH MONTGOMERY,
Solicitor for Appellant.

Endorsed: Filed July 19, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Of Cross-Appellant.

Now, on this 15th day of July, 1921, comes the above named plaintiff, Julia Green Graef, appearing by Messrs. Platt & Platt, Montgomery & Fales, her solicitors of record, and says, that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered thereon on the 26th day of February, 1921, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entitled Court erred in refusing to declare void the conveyances from R. E. Green, deceased, to J. L. Niday, which conveyances are more particularly described in the interlocutory decree entered by the above entitled Court on the 23rd day of Dcember, 1920, and in refusing to enter a final decree setting aside said conveyances and in refusing to enter the form of decree requested by the plaintiff in the above entitled action.

II.

Because the above entitled Court erred in allowing to the defendant J. L. Niday the sum of Nine Hundred ($900.00) Dollars as a credit for money alleged to have been advanced to R. E. Green, de-

ceased, in connection with the deed of Decembr 22, 1914, more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

III.

Because the above entitled Court erred in awarding to the defendant J. L. Niday the sum of Nine Hundred ($900.00) Dollars as an allowance for personal services in supervising the lands described in the deeds from R. E. Green, deceased, to J. L. Niday more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

IV.

Because the above entitled Court erred in awarding to the defendant J. L. Niday the sum of Fifteen Hundred ($1500.00) Dollars as a commission for selling the real property described in the deeds from R. E. Green, deceased, to the said J. L. Niday more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

V.

Because the above entitled Court erred in awarding to the defendant J. L. Niday interest at the rate of eight (8%) per cent per annum on all moneys advanced by him in connection with the maintenance and care of the real property described in the deeds from R. E. Green, deceased,

to J. L. Niday more particularly set forth in the interlocutory decree of the Court filed in the above entitled action, which interest was allowed from the respective dates of said advancements to the date of the final decree entered in the above entitled Court, and which interest was also allowed on the total amount of moneys held to be due from the plaintiff to the defendant J. L. Niday from the date of the final decree of the Court until the payment of the same, for the reason that no interest should be allowed on such advancements and for the further reason that the rate of interest actually allowed was one (1%) per cent in excess of the statutory rate provided for by the statutes of the State of Idaho.

VI.

The Court erred in allowing to the defendant J. L. Niday the full sum of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents ($4,313.47) and in requiring the plaintiff to deposit said sum of money before entering a final decree and final order of accounting from which the plaintiff could appeal.

VII.

Because the above entitled Court erred in refusing to award to the plaintiff the amount of the actual expenses incurred by her in maintaining the above entitled cause to set aside the deeds from R. E. Green, deceased, to the defendant J. L. Niday

more particularly described in the interlocutory degree entered by the Court in the above entitled cause.

VIII.

Because the above entitled Court erred in requiring the plaintiff to deposit to the credit of the said J. L. Niday the sum of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents ($4,313.47) as a condition precedent to the entry of the final decree under penalty of a dismissal of said suit with prejudice in the absence of such tender.

IX.

Because the above entitled Court erred in allowing to the defendant J. L. Niday any profit or instrument arising out of the possession, maintenance or sale of the real property described in the deeds from R. E. Green, deceased, and J. L. Niday more particularly set forth in the interlocutory decree of the Court entered in the above entitled cause, the validity of which deeds, under the decision of the above entitled Court in the above entitled cause, could not be sustained on any theory or explanation.

PLATT & PLATT,
MONTGOMERY & FALES,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon,)

I, Hugh Montgomery, one of the solicitors for the appellant, hereby certify that I have prepared a copy of the Assignment of Errors in the within case, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the defendants and appellees, at his place of business in Boise, Idaho, with postage thereon prepaid, and deposited the same in the United States mail.

HUGH MONTGOMERY,
Solicitor for Appellant.

July 15, 1921.

Endorsed: Filed July 18, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL.
Of Cross-Appellant.

KNOW ALL MEN BY THESE PRESENTS: That we, Julia Green Graef, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green in the full and just sum of One Thousand ($1000.00)

Dollars, to be paid to the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green or their executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals this 18th day of July, A. D. 1921.

Whereas, lately, at the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in said Court between Julia Green Graef, plaintiff, and J. L. Niday and Mollie Green Niday, his wife, George A. Buell and Effie A. Buell, his wife, and A. L. Green, defendants, a decree of final accounting was rendered awarding to said defendants certain rights, and said Julia Green Graef having petitioned an appeal and filed a copy thereof in the Clerk's office in said Court to reverse and modify the same in the aforesaid suit, and a citation directed to the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the City of San Francisco on the..... day of August, 1921, having been served on said defendant;

Now the condition of this obligation is such, that if the said Julia Green Graef will prosecute her appeal to effect any answer all damages and costs if she shall fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JULIA GREEN GRAEF,

PLATT & PLATT,

MONTGOMERY & FALES,

By HUGH MONTGOMERY,

Her Solicitors of Record.

AMERICAN SURETY COM-...
PANY OF NEW YORK,

By BRADLEY SHEPPARD,

Resident Vice President.

Attest: O. O. HAGA,

Resident Asst. Secretary.

(SEAL)

Examined and approved this 19th day of July, 1921.

FRANK S. DIETRICH,

Judge.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon,)

Due service of the within Bond on Appeal, by certified copy thereof, as required by law, is hereby

acknowledged at Boise, Idaho, this..... day of July, 1921.

.....

Of Solicitors for Appellees.

Endorsed: Filed July 19, 1921.
W.D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CROSS APPELLANT'S PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Court:

Please prepare and certify for the appeal of the plaintiff herein to the Circuit Court of Appeals of the United States for the Ninth Circuit, copies of the following:

I.

Original decision of the Court, filed October 25th, 1920.

II.

Interlocutory decree of the Court, filed December 23rd, 1920.

III.

Final decree of the Court, filed February 25th, 1921.

IV.

Transcript of the record, which has been lodged in the Clerk's office by the appellant.

V.

Petition for appeal and citation on appeal.

VI.

Order allowing appeal.

VII.

Assignment of Errors.

VIII.

Appeal bond.

IX.

This praecipe.

X.

Citations showing service and return.

XI.

Certificate of the Clerk.

XII.

The decree prepared and presented by the plaintiff, which decree was denied by the Court; also the written authorization to the Clerk for the payment of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents ($4,313.47).

PLATT & PLATT,
MONTGOMERY & FALES,
Solicitors for Plaintiff and Appellant.

HUGH MONTGOMERY,
Of Counsel.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon,)

I, Hugh Montgomery, one of the solicitors for the

appellant, hereby certify that I have prepared a copy of the *Praccipe for Transcript of Record,* in the within case,, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the dependants and appellees, at his place of business in Boise, Idaho, with postage thereupon prepaid, and deposited the same in the United States mail.

HUGH MONTGOMERY,
Solicitor for Appellant.

July 15, 1921.

Endorsed: Filed July 18, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CITATION.

United States of America to Julia Green Graef and Hugh Montgomery, her Solicitor, Greetings:—

You are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Idaho, Southern Division, wherein Julia Green Graef is complainant and J. L. Niday, and Mollie Green Niday, his wife, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. You are hereby cited and admonished to be and

appear in said Court at San Francisco, California, thirty (30) days after the date of this citation to show cause if any there be, and why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Dated Boise, Idaho, this 22nd day of July, 1921.

.....

Witness the Honorable Frank S. Dietrich, Judge of the United tSates District Court for the District of Idaho, this 22nd day of July, 1921.

FRANK S. DIETRICH,
United States District Judge.

Service of the within and foregoing citation on appeal herewith accepted.

HUGH MONTGOMERY,
Solicitor for Complainant.

Endorsed: Filed Aug. 10, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between counsel that the record filed in this Court upon the appeal of said J. L. Niday et al., as appellants, and upon the cross appeal of Julia Green Graef, as appellant, may be consolidated, and that the whole record or such parts thereof as counsel desire shall be considered by the Court on each of said appeals, and each party to pay the original

cost of the preparation of their respective records.

ALFRED A. FRASER,
Solicitor for Appellant.
PLATT & PLATT,
MONTGOMERY & FALES,
Solicitor for Appellee.

Endorsed: Filed Aug. 11, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties that if the cross appellant, Julia Green Graef succeeds upon her cross appeal in the Circuit Court of Appeals for the Ninth Circuit of the above entitled action and costs shall be awarded her against the defendants, that the defendants be only required to pay one-third of the cost of printing and certifying the record on cross appeal.

PLATT & PLATT,
MONTGOMERY & FALES,
Solicitor for Plaintiff.
ALFRED A. FRASER,
Solicitor for Defendants.

Endorsed: Filed Aug. 11, 1921.
W. D. McREYNOLDS, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things

thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

(Seal)

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 275, inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein, upon Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipes filed herein by the Appellant and Cross Appellants.

I further certify that Appellant's cost of the record herein amounts to the sum of $222.35, and the Cross Appellant's cost of the record amounts to the sum of $125.75 and that the same has been paid by the respective parties.

Witness my hand and the seal of said Court this 31st day of August, 1921.

W. D. McREYNOLDS,
Clerk.